The Central Law Journal.

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CURRENT TOPICS.

THE Association for the Reform and Codification of the Law of Nations held its fourth annual meeting at Antwerp during the last week in August. The meeting was largely attended, and the proceedings were of a very interesting nature. During the last two years of its existence the association has grown from a membership of ninety to one of five hundred and thirty. Its members are composed of representative jurists and statesmen of different countries of Europe and America. Among the subjects discussed at the last meeting were General Average; Continuous Voyages; Relief of Distressed Sailors; The Assimilation of the Bankruptcy Laws of the different Nations; International Copyright; Patent Laws; the Surrender of Criminals; and the International Egyptian Tribunal.

WE have received from Messrs. Nourse, Kauffman & Co. the following note: "The report of case of Player, Assignee, v. Lippincott, page 260, C. L. J., just received, is imperfect, in that it fails to show upon what the case was heard. The case is an important one, and we would like a fuller report." We learn, on inquiry, that the case was heard upon the pleadings and proof. The bill waived a sworn answer; hence defendants were obliged to give their depositions, which in all respects supported the averments of their answer. Since our report of the case in the district court, it has been argued in the circuit court and decided by Judge Dillon, who affirmed the decision of the district court. Judge Dillon rendered his opinion orally, and it has been reported. He, however, found the facts as alleged in the answer of defendants, and decided the case upon the authority of Sawyer v. Turpin, 1 Otto, 114.

SIR JAMES FITZJAMES STEPHEN, whose Digest of the Law of Evidence and Digest of the Criminal Law of England, have met with deserved favor in this country, has communicated an article to the *Nineteenth Century*, on "Preparation for Codification." "The great object," he says, "still to be effected is the improvement of the form of the law by its condensation and re-arrangement. This is essentially a literary problem, though it is not usually regarded in that light; but till it is so regarded, and till systematic and organized efforts are made for its solution as such, I do not believe that codification, except in some isolated subjects, will be possible, and I doubt whether an attempt to codify other parts of the law would be of much use." He proposes to begin the work by re-editing the law reports, so as to cut away the dead wood—reject obsolete and useless matter—and group the cases in chronological order under the titles to which they belong. The great difficulty in the way of doing this lies in the fact that many cases treat of several distinct subjects more or less interwoven, and hence, in order to attain a clear classification, the integrity of such cases would have to be broken up. His idea is, as we understand it, to re-report all the case law which is worth preserving, in some such form as Dane's Abridgment, and to use this as the basis of another compression which is to be a code. The great difficulty seems to be to find any society which is able to afford means for such an undertaking; and the *Solictor's Journal* says that, if the work is to be done at all, it will have to be subsidized by the government. In this country the difficulties in the way of such an undertaking seem insurmountable. Some of the older states, whose case law is pretty well built up, might, perhaps, make for themselves codes on the plan suggested by Sir J. F. Stephen; but we never shall have an American code as long as our present mixed system of government continues.

FRANK J. BOWMAN, ESQ., whose case we have heretofore referred to as undergoing investigation by the grievance committee of the St. Louis Bar Association, has come out in an open letter addressed to Judge Krum, the president of that body, complaining of unfair treatment. He charges that, during his absence in Europe, the committee "made an argumentative report, based upon assumed facts, and afterwards procured its publication in the St. Louis *Times*." We have all along abstained from commenting upon the merits of this case, as is our practice with reference to any case which is undergoing judicial investigation. But we shall take the liberty to say that Mr. Bowman left suddenly for Europe, while his case was undergoing investigation by the bar association; that, upon his return, he accused the committee, in the making and publication of their report, of doing him a great injury, through motives of jealousy at his professional success; that, having done this injury, they were delaying the prosecution of the case; and, as he alleged, for the purpose of bringing the question at issue to a speedy trial, he brought an action for libel against the members of the committee. This open letter of Mr. Bowman's appears to have elicited no reply, other than a letter from the chairman of the grievance committee as follows: "Sir—The committee of the bar association are prepared to hear anything you have to say in the matter of your receipt of $7,000 from the bondholders in the Pacific Railroad cases; also the receipt of $350 from the defendants' attorney in the case of the State v. Murray, Miller & Co., and other sums from other parties than the plaintiffs in said last-mentioned case. They have set Monday at 12 M., Oct. 1, at the rooms of the association, as the hour for hearing you." As a friend of Mr. Bowman's, we humbly suggest that it would be wiser for him to stop trying to excite public sympathy through the newspapers, and confine himself diligently to the details of his defense.

We know nothing about the nature of his connection with the life insurance cases, or with the lottery cases. But in the Pacific Railroad cases the committee have unearthed a matter which will require all of Mr. Bowman's well-recognized ability to make clear.

ANOTHER new venture in legal journalism comes to us from Tyler, Texas, called *The Texas Law Journal*. It is owned and published by S. D. Wood, Esq., and the subscription price is $5 per annum in advance. It is an eight-page sheet, nearly as large as the St. Louis *Republican*. Each page contains four columns of reading matter, set in good, large type. Our readers will gain some idea of the size of this journal when we tell them that the number before us contains, besides a considerable amount of miscellaneous matter, *twelve* cases reported in full, and some of them long ones, too. This amount of matter is furnished every week—an amount equal to six volumes of reports per annum. We have been too long in legal journalism not to know that Mr. Wood has greatly miscalculated the amount of matter which he can furnish in a local paper at this price, unless he has some other assistance than his subscription list. We notice, however, that the United States District Court for the Western District of Texas has extended to this most worthy enterprise the liberal aid of nearly a page of advertisements in bankruptcy cases. In this manner the courts and the bar have aided in maintaining law journals devoted to local interests, in New York, Philadelphia, Pittsburg, Chicago, St. Paul and San Francisco, but not in St. Louis. The patronage which the CENTRAL LAW JOURNAL receives from the bench and bar of this city, liberal as it is, would suffice to run it just three weeks, and no longer; yet we are constantly blamed for not devoting more space to local matters! Altogether, the *Texas Law Journal* is the most creditable venture of the kind which we have met. We sincerely hope that Mr. Wood will succeed in maintaining it at its present standard of excellence, and that he will not fall into the careless habit of reprinting important matter from other law journals without credit, as he has done in the case of Commissioners of Johnson County v. Thayer, which appears with a syllabus prepared by one of the editors of this journal.

IS A MAN'S NAME ASSIGNABLE IN BANKRUPTCY?

No court has ever yet passed upon the question whether a man's soul passes to his assignee by virtue of an assignment in bankruptcy. Nor has any court been called upon to determine whether his body so passes; although, the right of a man to dispose of his body by will being recognized, it might follow that he has such a proprietory interest therein, as, subject to the life estate which in free countries is reserved to him on grounds of public policy, might pass to his assignee. It is pretty clear that a part of his body, such as the articulated bones of a limb, might so pass. For it would be difficult to classify such a piece of property with any of the articles which, by the laws of the various states, are exempt from execution, and consequently from assignment in bankruptcy. It would be neither a farm implement, nor the tools of a mechanic's trade, nor wearing apparel (for it has ceased to be worn), nor necessary household or kitchen furniture, unless, indeed, it were used to poke the fire with. In vain might the poor debtor expostulate with his assignee, as did Mr. Wegg with his friend Venus: "It is a part of *me*, sir—a part of *me*." "It *was* a part of you," the heartless assignee would reply; "but by reason of being severed from the parent trunk, it has become assets, and belongs to me."

Greater than a man's body and next to his soul, is his good name. We have high authority for considering this a species of property of peculiar value. Shakspeare (himself a lawyer) says:

> "He that filches from me my good name,
> Robs me of that which not enriches him,
> And makes me poor indeed!"

Certain it is that a man's good name is a thing susceptible of injury. The Roman law visited attacks upon it with severe penalties, and the common law makes injuries to it indictable offenses, and a ground of recovering damages. To this, of course, there must be admitted an exception in the case of the good name of a judge. That does not belong to him, but to the public; so that every nasty and lying newspaper, like the Indianapolis *Sentinel* and the *Nation*, is at full liberty to play at shuttlecock and battledore with it. Therefore, when a newspaper like the *Nation* permits a correspondent in its columns to accuse a great judge of stealing a hundred dollars, no injury is done to the property of the judge himself: the injury is against that of the public. It is hence clear beyond all room for argument that the good name of a judge, not being his own, would not pass to his assignee in bankruptcy.

But until a recent decision of Judge Westbrook of the Supreme Court of New York, the rule was thought to be different in the case of the good name of a patent medicine man. As that belongs to himself and not to the public, it was thought that it would pass to his assignee in bankruptcy, and, under the hammer of the latter, to the highest bidder. Accordingly, when Henry T. Helmbold, the celebrated Buchu man, became bankrupt, his assignee in bankruptcy sold to the brother of the former, Albert L. Helmbold, the title and right to use the name "H. T. Helmbold's Highly Concentrated Fluid Extract of Buchu," and the brother established a lucrative trade therein. But *the* Helmbold, having escaped from a lunatic asylum, organized "The Henry T. Helmbold Manufacturing Company," and began to manufacture under his personal supervision and to vend the same article—an article which in better days had made him rich and famous. The brother brought an action against the latter's company to restrain it from so doing. The learned judge denied the injunction, and in so doing said:

"The name of a man is a part of his being, so indissolubly connected with and attached to him that we fail to see how the one which distinguishes and separates Henry T. Helmbold from all mankind, and enables the public to know him and that which he has prepared, can be taken from him and given to another, so that the latter, by the use of such name, may vend and sell his own preparations as if they were those of the former. If this can be done, then the law and the courts not only enable the quack and the adventurer to impose their compounds and manufactures upon the public under the disguise and cover of an honored name, but they have with the property of the unfortunate bankrupt, also appropriated and transferred his knowledge, skill and reputation. Is this the policy of our bankrupt statutes? If it is, then, instead of being a mode of relieving the debtor class, as well as a source of protection to their creditors, every bankruptcy statute is a grave, in which every hope and aspiration of the future of him who can be subjected to its operation must be forever buried. Hitherto, the unfortunate being whose property has been swept away by the vicissitudes of business, has supposed his knowledge and reputation were still left him as a capital for a new beginning. That resource is now also gone, if the plaintiff in this cause is right in his claim, and the future of the bankrupt is shrouded in a darkness so thick and gloomy that not a single ray of light is left to relieve its horrors. To the soundness of such a result, this court is unable to subscribe. The name of Henry T. Helmbold must still belong to him, to whom his parents gave it. No law and no court can take it from him. The property which he had acquired belongs to his creditors, but the name, and whatever of character, good or bad, belong to it, and which he has himself made, are his, and must so continue to be until he voluntarily parts with them. He has the right to make any extract he pleases, and to tell the public, by the use of his own name, that the preparation is his, and not that of another, and neither the plaintiff nor any other person can place that name upon a preparation not his, against his will, and deprive him of the use thereof. Such act would not only impose upon others, but be so cruel and outrageous toward him that, as it seems to me, no law and no court could justify it.

"The principle that a manufacturer can apply his own name to his own creation, was fully recognized by the court of appeals in Menelley v. Menelley (62 N. Y. 427). Though it was conceded that the plaintiffs in that cause had succeeded to the business of the original manufacturer (Andrew Menelley) of the famous Menelley bells, it was held that the defendant had the right to call all the bells made by him by his own name (Menelley), provided he did not use that name so as to make the public believe that his bells were constructed by the plaintiffs. Such a use of his own name is all that Henry T. Helmbold claims, and it is just such a use which the plaintiffs would prevent and enjoin. The former does not seek to impose upon the public his own mixture by giving them to understand that it is the preparation of the latter. On the contrary, he most carefully notifies the world that he, through the company which bears his name, and with which he is actively connected, and not the plaintiff, manufactures the arcticle which he offers for sale. Unlike the defendant in Croft v. Day (7 Beavan, 84), and in other cases to be found, he sails under no false colors to the injury of the public and the plaintiff, but plainly hoists his own, distinctly proclaiming that the preparation offered is his and not that of the plaintiff. Indeed, so loudly and publicly has his proclamation, by means of advertisements, been made, that one of the grounds of complaint which the plaintiff has strenuously urged is that Henry T. Helmbold is causing the world to believe that he, and not the plaintiff, is that individual. In fact this cause is the exact opposite of Croft v. Day; for while in that case the complaint was that the defendant was causing the world to believe that he was the original Day & Martin, the famous blacking manufacturers, which was false, the complaint in this is that the original and genuine Henry T. Helmbold will not allow the plaintiff falsely to assume that individual's name, and thus enable him (the plaintiff) to impose upon the public. If a case founded upon such a position has either soundness or justice to commend it to the equitable power of this court, the discovery thereof has not been made by the judge to whom it was presented."

INSURANCE LAW — RE-INSURANCE — ULTRA VIRES—AMENDMENT.

CELSUS PRICE v. THE ST. LOUIS MUTUAL LIFE INSURANCE COMPANY.

St. Louis Court of Appeals, October Term, 1876.

[Opinion Filed January 29th, 1877.]

HON. EDWARD A. LEWIS, Chief Justice.
" ROBERT A. BAKEWELL, } Associate Justices.
" CHAS. S. HAYDEN, }

1. PRACTICE—AMENDMENT OF PLEADINGS.—Where the circuit court has jurisdiction of the subject matter and the defendant, and thinks the pleadings defective, argumentive or ambiguous, it should permit the party to amend, and when such party is the plaintiff, should not dismiss the case until the plaintiff has had an opportunity to amend.

2. INSURANCE CO.—SPECIAL CHARTER.—An insurance company incorporated under a special act is as much subject to the general insurance law of the state, as if incorporated under the general law of the state.

3. STATUTE CONSTRUED.—The forty-first section of the act entitled, "An act for the incorporation and regulation of life insurance companies," (Wag. Stats., 1872, p. 753) was intended to protect policy-holders in companies which may have ceased to take risks, as well as those which continue to assume new obligations.

4. POWER OF DIRECTORS TO TRANSFER ASSETS TO ANOTHER COMPANY.—The directors and officers of a mutual life insurance company have no power in the name of such company, against the wishes of any of its policy-holders, to transfer all its assets to another company, under the pretense of re-insurance, or otherwise, and a contract entered into for such purpose is *ultra vires* and void as to such dissenting policy-holders.

5. EXTENT OF POWER TO RE-INSURE.—The power given to an insurance company in its charter to re-insure any

risk or risks of said company does not empower it in one contract to re-insure all its risks, dispose of all its assets, turn its policy-holders over to a stranger company, and thus deprive itself of the power to insure.

HAYDEN, J., delivered the opinion of the court:

This was a proceeding under the act for the incorporation and regulation of life assurance companies, (Acts 1869, p. 26, Wag. Stats. p. 738), instituted by the superintendent of the Insurance Department to restrain the respondent from doing further business as a life insurance company, and to wind up its affairs. On the 7th day of December, 1876, the appellant filed his petition in the court below, in which he had averred that on the 15th day of December, 1873, the Mound City Life Insurance Company, a corporation incorporated under the laws of this state, entered into a pretended contract of reinsurance, by which, in consideration of a pretended assignment to it of the assets of respondent, it agreed to reinsure the risks of the respondent; and appellant annexed a copy of the contract and made it part of his petition. The appellant further averred, that having good reason to suspect that the affairs of the respondent, which was then doing business in this state as a life insurance company, incorporated under its laws, by and through the Columbia Life Insurance Company (averred to be the Mound City Life Insurance Company by change of name), were in an unsound condition, he required of respondent a special statement of its affairs, and was by its president referred to the president of the Columbia Life Insurance Company; that a special statement of the affairs of respondent being furnished, the appellant, not being satisfied that the affairs of the respondent were, or could be in a safe condition, appointed a disinterested person to make a personal examination into the affairs of the respondent, whose report, showing the condition of the affairs of the respondent, is annexed to the petition. The petition then states that the assets of the respondent on the 1st day December, 1876, were $909,233.66; that there is due to the policy-holders for death claims and endowments $161,202.68; that the policies in force amount to about $7,300,000; sets forth that a large number of suits are pending against the respondent; that its assets are being so rapidly diminished as to render its further proceeding hazardous to the public and its policy-holders; and prays for an injunction to restrain the respondent from further proceedings with its business; that a receiver be appointed to take possession of its property, etc. The respondent, in its answer, admits the contract with the Mound City Life Insurance Company; says that the respondent has no knowledge or information sufficient to form a belief as to whether appellant had good or any reason to suspect that the affairs of respondent were in an unsound condition; admits that many suits are pending against the company for premiums; and denies that the assets are being so rapidly diminished as to render its further proceedings hazardous to the public or to its policy-holders. The answer then sets up that under powers in its charter expressed, and being in 1873 prohibited by order of the court below at the suit of the then Superintendent of the Insurance Department of this state from doing any further new business, it made the contract of reinsurance annexed to the petition; says that that contract was lawful, fair and reasonable, and made to secure the payment of its policies, with a sound and able company, was approved by the then Superintendent of Insurance and by the court below; and alleges that it has been fully kept and performed by the respondent, and, up to the institution of the present suit, by the reinsuring company; that since the date of the contract all legal claims upon the respondent have been promptly met; and ends by denying the jurisdiction of the court below, on the ground that respondent has ceased to do new business, to assure lives or to dispose of or purchase annuities or endowments, and on the ground that having reinsured all its risks, it is not subject to the provisions of the fifty-first section of the above named act.

The plaintiff filed a motion for judgment upon these pleadings, which motion the court overruled. The court then dismissed the petition, whereupon the appellant filed a motion to set aside the order of dismissal, on the ground that the court erred in dismissing the case, and that in any event the plaintiff was entitled to amend his petition.

The contract by which this transfer of assets was made is as follows:

"Whereas, The Board of Directors of the Mound City Life Insurance Company did heretofore, to wit: on December 11, 1873, pass resolutions and submit the same to the St. Louis Mutual Life Insurance Company, as a proposition in writing, and in the words and figures following, to wit: At a meeting of the Board of Directors of the Mound City Life Insurance Company, held December 11, 1873, the following, after consideration, was adopted:

"Resolved, That this company submit the following proposition to the St. Louis Mutual Life Insurance Company: That in consideration of the transfer and sale of all the assets, of whatsoever name and nature, of the St. Louis Mutual Life Insurance Company to the Mound City Life Insurance Company, or to such person or persons as the last-named company may designate, in trust, for the said Mound City Life Insurance Company, the said Mound City Life Insurance Company will re-insure all the risks of the said St. Louis Mutual Life Insurance Company, and assume and pay all the debts and liabilities of the St. Louis Mutual Life Insurance Company, reserving all legal defenses to such debts and liabilities as the St. Louis Mutual Life Insurance Company may now or hereafter have to the same, and will issue an equal amount of stock of the Mound City Life Insurance Company for the stock of the St. Louis Mutual Life Insurance Company, to the stockholders of said last-named company, holding such stock subject to any offsets to such stock which the St. Louis Mutual may now have, and agree to pay the stockholders holding and owning said stock so issued by the Mound City Life Insurance Company, in place and stead of St. Louis Mutual stock as aforesaid, the par value of said stock at, and if demanded at the expiration of, twelve months from the issue of said stock, and not afterwards. Reserving the option to pay said par value for said stock at any time within twelve months from date; and if such offer and payment for said stock, or any part thereof, be not accepted by the parties holding same, then the parties so holding said stock can not compel said last-named company to redeem and pay as aforesaid, at the end of twelve months from date.

"And for the purpose of insuring the ability of the Mound City Life Insurance Company to carry out the terms of this resolution, and any contract which may be drawn and executed hereunder, the said Mound City Life Insurance Company proposes to increase its capital stock to one million dollars, one hundred thousand dollars of which increase shall be represented by said issue and substitution of stock certificates of Mound City Life Insurance Company, for those of said Saint Louis Mutual Life Insurance Company. Said increase of stock to be secured and paid in full compliance with laws of the State of Missouri, and to the satisfaction of the Superintendent of the Insurance Department or Missouri. If the terms of this resolution be accepted by said St. Louis Mutual Life Insurance Company, then a contract in duplicate, fully em-

bodying the terms of this resolution, is to be executed as soon as practicable by the respective companies, and deposited in escrow with some person agreed upon, and to be delivered, upon the Mound City Life Insurance Company having increased its stock to the sum of one million dollars as aforesaid; provided said increase be effected within sixty days from date of said contract. Said contract, when drawn, to be approved by the Superintendent Insurance Department and Judge Madill, of the St. Louis Circuit Court. And, in the meantime, said St. Louis Mutual Life Insurance Company shall be at liberty to proceed with the legitimate transaction of its business. None of the assets of said Saint Louis Mutual Life Insurance Company being, pending compliance by said Mound City Life Insurance Company with the condition aforesaid, sold or disposed of, other than in the regular and legitimate transaction of the business of said St. Louis Mutual Life Insurance Company.

"(Signed), ALFRED M. BRITTON, President.
Attest: (Signed), S. W. LOMAX, Secretary.

And whereas, Afterwards, to wit: on the same day the Board of Directors of the St. Louis Mutual Life Insurance Company did pass the following resolution as acceptance of said proposition:

"Resolved, That the proposition of the Mound City Life Insurance Company this day submitted, to reinsure this company, is hereby accepted; provided, however, and this acceptance is upon condition that before any agreement is executed in behalf of this company, the committee heretofore appointed by this board, to wit: Messrs. Lewis, Priest, Donovan and Boyle may be, and they are hereby empowered to require any additional covenants and agreements on the part of said Mound City Life Insurance Company they may deem advisable; and provided farther, that before any agreement shall be formally executed with said Mound City Life Insurance Company, the same shall be submitted to the consideration of this board.

"And whereas, after consideration by the committee, the terms as hereinafter contained have been agreed upon, now, therefore, these articles of agreement, made in pursuance of said resolution, and to carry the same into effect by and between said Mound City Life Insurance Company, party of the first part, and the St. Louis Mutual Life Insurance Company, party of the second part, witness: That for and in consideration of the promises, covenants and agreements of said party of the second part hereinafter contained, the party of the first part, for itself, its successors or assigns, does hereby promise, covenant and agree to, and hereby does re-insure to said party of the second part, and to each and all of said second party, policy-holders or their assigns, any and all risk or risks upon the lives of individuals now outstanding and in force, and hereby guarantees unto said party of the second part, and each and all said policy-holders, that the said risks due, or as the same may become due, shall and will be by said party of the first part, promptly and duly paid according to said several policies or contracts, and to assume and hereby does assume and promise to pay and discharge all debts, contracts and liabilities of every nature and kind whatever of said party of the second part, and by virtue and force of this said assumption and promise, it is intended, and said party of the first part hereby agrees, that each policy-holder, and any and all creditor or creditors of said party of the second part who may choose so to do, may have and maintain, and enforce his or their legal claim or claims directly against said party of the first part, its successors or assigns, on a like notice of loss or demand against said second party, and in the same manner and with like effect as he might have enforced and maintained his or their claim or claims against said party of the said second part, and said party of the first part does hereby, in consideration as aforesaid, further promise, covenant and agree to save, keep harmless and indemnify said party of the second part, its successor or assigns from and against any and all debts, contracts, liabilities, costs, payments, expenses or demands of every kind and description, in law or in equity, or other at the date of this instrument outstanding and in force against said party of the second part, or that may hereafter accrue or exist against said party of the second part, on account, by reason of, or in any way growing out of any liability or demand of any kind now existing against said party of the second part or the action of its board of directors. But said party of the first part hereby reserves all legal defenses to said demands or liabilities, or either of them, that said party of the second part may now or hereafter have against the same. And in consideration as aforesaid, said party of the first part does hereby further covenant, promise and agree to issue to the stockholders of said party of the second part, stock of the party of the first part equal in amount at its par value to the stock of said stockholders at its par value, and in exchange for said stock of said stockholders, dollar for dollar, par value, subject, however, in each stockholder's individual case, to any set-off or liens which said party of the second part may now have on any of said stock now existing, provided the persons holding the stock of the party of the second part shall, within twenty days after personal notice, subscribe for an equal amount of the stock of the Mound City Life Insurance Company to the stock held by such persons in the St. Louis Mutual Life Insurance Company, to be paid for by the exchange of the stock of the party of the second part.

"And if such person or persons, or any of them, neglect or refuse to so subscribe and take said stock, then the party of the first part shall not be compelled to exchange its stock for the stock of said persons so neglecting or refusing to subscribe or pay for said stock of the party of the first part as aforesaid, or in any manner to redeem or pay for the stock of such persons any sum whatever. And said party of the first part does further promise, covenant and agree to pay to the stockholders holding and owning said stock so issued by the party of the first part, in exchange for said stock of the party of the second part, the par value of said new stock, if demanded at the expiration of twelve months from the issue thereof and not afterwards, but with option reserved to party of the first part, at any time within said twelve months, to offer and pay for said new stock to said stockholders, or their several assigns, said par value; and if said several stockholders shall refuse to accept said offer made within said period, such person or persons so refusing forfeits any further right to at any time demand of said first party par value for his stock or any part thereof as aforesaid, and said party of the first part shall not be required to purchase or redeem the same at any time in the manner aforesaid.

"And for the consideration aforesaid, said party of the first part does further promise, covenant and agree to secure by legal means and measures an increase of said first party's capital stock to one million dollars and have the same all duly subscribed for by responsible persons, *and paid or secured to be paid in accordance with laws of* the State of Missouri within sixty days from date hereof. Said increase of stock to include said one hundred thousand dollars par value of said new stock to issue to said stockholders of said party of the second part, and all to be to the entire satisfaction and approval of the Superintendent of the Insurance Department of Missouri. And in consideration as aforesaid, said party of the first part does further promise, covenant and agree that it has now a surplus as to poli-

cy-holders of at least four hundred thousand dollars, and will make its annual report for the year ending December 31st, 1873, and file the same as required by law with the Superintendent of the Insurance Department, and to be by him approved, exhibiting legally a surplus as to the policy-holders, of not less than four hundred thousand dollars.

"And said party of the second part does hereby covenant that the statement made for it by Edwin W Bryant, actuary, and others, dated Oct. 27, 1873, is believed to be a true and fair exhibit of said second party at said day, and that said party of the second part has not disposed of any of its property since said last named date, save in the legitimate transaction of its general business.

"And in consideration of the promises, covenants and agreements of said party of the first part hereinbefore contained, said party of the second part, for itself, its sucessors and assigns, does hereby covenant, promise and agree on the final delivery hereof as herein provided, to grant, bargain and sell, assign, transfer and convey unto said party of the first part, its successors and assigns, in due and legal form, and by sufficient conveyances, all its property, real, personal, and mixed of every kind and description, and wherever situated, and all said party of the second part's right, title and interest therein, and in each and every part thereof in law or in equity, and by good and sufficient power of attorney, to authorize and empower said party of the first part to ask, demand, sue for, recover and receive said property and every part thereof, in the name of said party of the second part, or otherwise as to said party of the first part may seem best, but in all cases and at all events, at the sole and separate costs and expenses of said party of the first part, which said party of the first part, as aforesaid, covenants, promises and agrees to assume and pay.

"All transfers and conveyances herein provided for, to contain no more than special warranty against lawful claims by any person or persons claiming by, through or under said party of the second part. And it is hereby mutually understood, covenanted and agreed that these articles shall, after due execution by the parties of the first part and the second part in duplicate, be approved both by the Superintendent of the Insurance Department of the State of Missouri, and by his Honor, Judge Geo. A. Madill, of the Circuit Court of St. Louis County, Missouri, to such extent and in such way as he deems proper, before the same shall be deemed or taken as executed, or of any binding force; and furthermore that these articles in duplicate, shall, upon said approval, be delivered, not between the parties, but be placed in escrow with William E. Burr, who shall hold the same for delivery, and who shall deliver the same interchangeably between the parties hereto, only upon the presentation to him of a certificate of the Superintendent of the Insurance Department of Missouri, under seal of said department, that the increase of stock of said party of the first part hereby provided for, has been legally made, that said stock has been duly subscribed for by persons in his opinion responsible, and said subscriptions have been paid or secured to be paid as in these articles provided and agreed. And that upon the production of said certificate in good faith made and presented, said William E. Burr shall deliver these articles interchangeably as aforesaid, and that thereupon said party of the first part, by its proper officers and agents, shall be entitled to enter upon and enjoy the immediate and unqualified possession and use absolutely of the property of the party of the second part as aforesaid, and said party of the second part will, by its proper officers and in due form, as aforesaid, without unnecessary delay, make and deliver unto said party of the first part all and any further deeds, deeds of trusts, conveyances, assignments or other instruments of writing, and other acts and things do and perform, to carry into full and lawful effect its agreements, promises and covenants herein contained.

"And it is further covenanted by said party of the first part that it will at all times manage, conduct and use each and all the property and assets by it received from the party of the second part, in pursuance of these articles of agreements, in connection with its own present property and assets, in good faith and to the best of its ability for the purpose of duly and lawfully meeting and paying the risks and other liabilities of the party of the second part to its policy-holders and others in connection with said first party's own present risks and liabilities.

"Should said party of the first part fail to produce said certificate of said Superintendent, as herein last provided, within said sixty days from the date hereof, then, upon demand, these articles in duplicate, shall be re-delivered, on demand, to said party of the second part, its successors or assigns for cancellation, and the same thereupon be cancelled or annulled. And it is, hereby further understood and agreed that until the final delivery of these articles by said William E. Burr, as herein provided for, said party of the second part shall possess, in full right, without question or interference, all of its said property and effects, and shall or may proceed with the legitimate transaction of its business, and pay off and discharge any and all of its debts, due, or becoming due, before final delivery of these articles, but not to dispose of any of its said property other than in the regular and legitimate transaction of its business, in all things as if these articles had not been made.

"In witness whereof, the said party of the first part and said party of the second part, have, by their several presidents, and under their respective seals, countersigned by their proper secretaries, executed these articles in duplicate, at St. Louis, Missouri, this, the thirteenth day of December, eighteen hundred and seventy-three.

"(Signed) MOUND CITY LIFE INSURANCE CO.,
[SEAL] By ALFRED M. BRITTON, *Prest.*
"(Attest) S. W. LOMAX, *Secretary.*
"(Signed) ST. LOUIS MUTUAL LIFE INS. CO.,
[SEAL] By WM. J. LEWIS, *President.*
"(Attest) ALEX P. STEWART, *Secretary.*"

The first question which arises in this case, is whether the court below had jurisdiction of the proceeding against this respondent. If it had not, the court was authorized to dismiss at any stage of the case. This question involves the inquiry, whether the defendant is subject to the provisions of the act for the incorporation and regulation of life insurance companies, and especially of the forty-first section of that act. The respondent contends that as it exercises its powers by virtue of a special charter (Acts 1861, p. 158), it is exempt from the provisions of the general act. But it is clear from the language of the general law, that the legislature intended that some of its provisions should apply as well to life insurance companies incorporated under special acts, as to those organized under the general law. Section 19, 20, 22 and 41. There can be no question as to the intention; nor can there be any question as to the power of the legislature to make the provisions of the forty-first section applicable to companies in the situation of the respondent. The provisions in question are general regulations for the protection and security of the citizen, made by the legislature in the exercise of its powers of supervision and superintendence, and in no way impair the obligation of a contract. Curtis v. Whitney, 13 Wallace, 68; Ochiltree v. Railroad Company, 21 Wallace, 249; State of Missouri

v. Matthews, 44 Mo. 533; State, etc., v. King, Ib., 283.

What averments, then, are necessary to be made under the forty-first section in order to bring the case within the statute? Respondent contends that the petition does not show that the respondent was doing business at the time of the filing of the petition, within the terms of the act; nay, more, that the petition by its language and by the contract, made part of it, shows that the respondent had ceased to do business and so was not amenable under the section. The words cited by respondent, "doing business in this state" in the fourth line of section 41, do not bear on this question. These words are used in the disjunctive in opposition to the words "incorporated under the laws of this state," as shown by the same words used further on in the section, where companies "doing business in this state," are spoken of as "companies not incorporated by the laws of this state." This part of the statute divides into two classes, all companies subject to its provisions: First, those incorporated under the laws of the state; second, those doing business in the state, and not incorporated under its laws. The words of the section which bear on this question are: "If upon any such examination it shall appear to said superintendent, that any company created by or organized under any law of this state, and doing any business mentioned in the first section of this act is insolvent, or that its condition is such as to render its further proceedings hazardous to the public or those holding its policies, he shall file a petition," etc. The business mentioned in the first section of the act is the business of life insurance, and business connected with it, such as life insurance companies especially do. The reference is general, and the particular words of the first section are not referred to, but its substantial meaning. Accordingly, the above quoted clause would seem to mean "any company organized under any law of this state and doing any business" of life insurance or business connected therewith, such as life insurance companies especially do. But the words a little further on aid greatly in explaining what the legislature means. They show that the intent is to protect, not merely the public generally, who have not, but may become policy-holders, but also those who have already become policy-holders. The words are: "Harzardous to the public *or to those holding its policies.*" If, then, we suppose the case of a company issuing no new policies and making no new assurances but which has policies outstanding on which it is receiving premiums and paying losses, would not such a company, within the words of the act, be "doing any business" of life insurance or business connected therewith, such as life insurance companies especially do; and provided its condition were such as to render its proceedings hazardous to its policy-holders, would not they be the very persons whom it is the office of the act to protect? Surely the fact that the company has ceased to take new risks can not be invoked to deprive existing policy-holders of the benefits of an act, passed as much for their protection as for that of the non-policy-holding public. It would seem that the act itself considers that companies which have policies outstanding, on which they are receiving premiums and paying losses are engaged in business; and as if to cover the case it uses the broad words, "doing any business." That is the best construction of an act, other things being equal which gives to every word its appropriate force; and where, as here, the reason of the rule and the words of the act correspond with each other, the argument is doubly strong to prove the legislative intent.

Moreover, the argument that the act does not apply because the company is doing no new business, virtually begs the question. The payment of new premiums by which policies are kept alive, and the payment of new death-losses by which policies are discharged, is not business which has ever been done before; and it is business of life insurance and such as life insurance companies especially do. There would certainly be some scope for the operation of a writ of injunction, which should restrain a company so acting from "further proceeding with its business."

But it is said the petition does not contain even any general averment to the effect that the respondent was at the date of the filing of the petition, doing the business described in the first section of the act; that it does not even aver that the respondent was doing any business as a life insurance company. The petition is, indeed, singularly bare of any direct averment, in respect to this essential matter. But it does incidentally allege that the respondent was doing business in this state, "in manner as aforesaid," by and through the Columbia Life Insurance Company. This allegation, in itself, not easily understood, must be taken in connection with the averments as to the contract of Dec. 15th, 1873. This contract is made part of the petition and may be considered as set forth in it. Thus it becomes necessary to consider the legal effect of this contract. This, too, we are bound to consider, irrespective of the question of pleading, because, as the answer admits the execution of the contract, if it appears that, on all the facts as they were before the court below on the motion for judgment, the court had jurisdiction, it should have permitted the plaintiff to amend his petition, and should not have dismissed the case.

The contract, or the material part of it, is given above. By it the respondent agrees to sell, transfer and deliver all its property and assets to the Mound City Life Insurance Company, and the latter, on its part, agrees to reinsure, and states that it does reinsure all the risks of the respondent, and further agrees to pay all its debts and liability. It would seem that it was the intention of the parties that all the business, as well as the assets, of the respondent should be turned over to the Mound City Company. The respondent wished to get rid of every possible obligation, present or contingent, and substitute the Mound City Company for itself; and for this purpose was willing to turn over all its property. Perfectly correct motives may have actuated the directors; they may have thought they were making an arrangement highly beneficial for policy-holders as well as for stockholders. But the question of the legal right to make such a contract, and by it to bind the policy-holders, is another matter. The law does not compel a person to be benefited against his will. He may resist the attempts of those who have contracted with him to do him good in a way different from that which the contract calls for, and insist on having his mere legal rights. Persons in the situation of these policy-holders can not be turned over to a third party with whom they have not contracted. They never assented to the agreement, and the statute has a clear field of operation as to them. So far as they are concerned, the business of the company is as it ever was. Nor does it avail to insist that the contract by which all the property of the respondent is turned over is a contract of reinsurance. The argument implies a misunderstanding as to the nature of this kind of contract. When a risk is reinsured, *no privity ensues between the first insured and the reinsurer.* The reinsurance gives the first insured no rights as against the reinsurer. He has a remedy against his own insurer, and against him alone. This is well settled, and it would be unnecessary to state so plain a principle, if the argument of the respondent did not seem to imply that the obligations of the respondent to its dissenting policy-holders are in some way destroyed or lessened by virtue of the reinsurance.

The respondent claims, however, that it had a perfect right to make this contract, by reason of the second section of its charter. This section, after giving the power to make all manner of agreements for the insurance of the lives of persons, and policies of insurance for the insurance of human life, continues as follows: "And may do and perform generally every act and thing to the business of life insurance belonging, or in anywise appertaining; and may reinsure said corporation, or cause the same to be reinsured against loss on or by any risk or risks which shall have been heretofore taken, or which may be hereafter taken by said company." The power of disposing of all the assets of the company and depriving the policy-holders of the property contributed by them, and in which they have a common interest, might as well be claimed under the clause first above quoted as under the second clause. Taking the words of the first clause in their widest possible latitude, and refusing to apply to them the established rules of legal construction, it could be said that the power to do any act and thing to the business of life insurance in anywise appertaining, carries with it the power to sell and transfer the property and business of one life insurance company to another. But probably the respondent would not claim any such power under the first clause. All such clauses must be interpreted *secundum subjectam materiam;* and the loose verbiage of acts drawn up in a style like that of the present charter makes more imperative the application of the legal rule. The power to reinsure is coupled in the charter with the power to insure, and both are given as powers necessary to carry on the business of life insurance.

Reinsurance, its object and effect, are things well known in law. The power enables a company to successfully carry on the business, and to prosper when it otherwise might fail, by procuring other companies to share in risks which are too large or too hazardous for the reinsured to bear alone. The less does not include the greater, or the incident carry with it the principle; nor, under a power to reinsure, can a company convey away all of its property, and deprive itself of the power to insure. It is safe to say that the legislature, where it intends to give a mutual insurance company the power to close its business, to dispose of its assets and to transfer its policy-holders over to a stranger company, does not do so under the grant of a power to reinsure.

The general rule is that the officers of a corporation can not, against the wishes of a minority of the stockholders, convey away the entire property which is essential to carry on the business of the company. There are some exceptions to this rule, in cases of private corporations of a strictly business character, in the management of which neither the state nor the public has any direct interest. Buford v. Keokuk N. Line Packet Co., decided at this term; Treadwell v. Salisbury Manuf. Co., 7 Gray, 404. These exceptions, however, have no bearing on the present case. The question here is whether the transfer is good as against policy-holders in a mutual insurance company for the insurance of lives—not as against stockholders in a business corporation. The policy-holders are made, by the respondent's charter, members of the company. The bulk of the property of the company is derived from the policy-holders, and may be considered as held for them. At the same time that they have a common interest in the profits and losses of the business of the company, they are all of them creditors, either actual or potential.

But still stronger reasons present themselves against the validity of this transfer. The state has an interest in the matter. It has adopted a line of policy which is plainly expressed in acts of the legislature. A department of insurance has been created, and a chief officer of that department appointed who represents the state in matters within the scope of his duties as prescribed by the acts. Various regulations are made for the good of the public and the protection of the citizen. In this respect life insurance companies stand in a position different from that of ordinary corporations. The legislature has said, in effect, that owing to peculiarities, either in their character or their management, life insurance companies must be subject to constant supervision and to many restrictions. This effectually excludes them from that class of corporations which have the power, in itself exceptional in its nature, to sell or transfer all their property, under certain circumstances, against the will of a minority of their stockholders. Such a power would contravene not only particular provisions of these acts, but their intent and purport. It would be impossible for the superintendent of insurance to properly exercise the powers vested in him, if an insurance company, subject to the provisions of these acts, could, at the will of its stockholders and against the wishes of any of its policy-holders, turn over all its assets to another company, either under pretense of reinsurance or otherwise. For instance, by the forty-first section of the act, the superintendent is required to institute proceedings for the protection of the policy-holders when he has good reason to believe that any company, organized under any law of this state, and doing any business as a life insurance company, is either insolvent or in such a condition as to render its further proceedings hazardous to those holding its policies. It is difficult to see how he could do this, if any life insurance company in the condition mentioned could withdraw itself from the operation of this section by making an agreement to turn over its property to another company, in consideration of the reinsurance of its risks and the payment of its debts. Such a construction would not only be at war with the intent of the act, but it would nullify the forty-first section so far as it relates to a large—possibly the largest—class of persons meant to be protected by its provisions. It follows that the transfer of the property of the respondent to the Mound City Life Insurance Company was illegal, as against dissenting policy-holders of the respondent, and that the contract of December 13, 1873, so far as it attempted to turn over the assets of the respondent, was, as against such policy-holders, *ultra vires* and void.

As it was apparent that the court below had jurisdiction of the subject matter, the particular proceeding and the defendant, if the court thought the allegations of the pleading, instead of being, as they should, clear and direct, were either defective or argumentative and ambiguous, it should have permitted the appellant to amend and conform his petition to well-established rules. On the motion for judgment the facts were before the court, and it was error to dismiss the proceeding at once, or before the plaintiff had an opportunity to amend.

The judgment of the court below, dismissing the petition, is reversed, and the case remanded to be proceeded with in accordance with this opinion.

All the judges concur.

In Bubble v. The Susquehannah Coal Co., Common Pleas Court of Lezerne Co., Pennsylvania, reported in a late number of the *Lezerne Legal Register*, the were twenty-three exceptions filed to the report of a referee. Handley, J., after disposing of the report of the referee, said, "We may add, while disposing of this case, that the number of exceptions filed in any one case ought not to exceed the number of the Apostles, and unless the pleader is confused, one-half that number will generally present all of the errors that any court, presided over by any man, may commit while trudging through the dark avenues of the law."

NEGLIGENCE CAUSING FIRE—PROXIMATE AND REMOTE CAUSE.

KELLOGG v. ST. PAUL & MILWAUKEE RAILWAY CO.

Supreme Court of the United States, October Term, 1876.

1. ACTION FOR DAMAGES FOR NEGLIGENCE—QUESTION OF TITLE, WHEN IMMATERIAL.—The plaintiff sued the defendants for the value of a saw-mill and a quantity of lumber burned by a fire, alleged to have been set by the negligence of the defendants. Both the plaintiff and defendants claimed title to the ground on which the mill and lumber stood, both claiming under a common source of title, and it was admitted that the plaintiff's claim was made in good faith. *Held*, that the question of title was immaterial. Even if the plaintiff should be evicted, he would, under the local statute (Code of Iowa, §§ 1976-1981), be entitled to value of the improvements made in good faith.

2. SAME — TESTIMONY OF EXPERTS. — In a case where fire is shown to have been communicated from one building to another, in determining whether the former fire was the proximate cause of the latter, the testimony of insurance men, as experts, to the effect that, owing to the distance between the two buildings, the former would not, in fixing the rate of insurance, be considered an exposure of the latter, will not be heard.

3. PROXIMATE AND REMOTE CAUSE — QUESTION FOR JURY.—What is the proximate cause of an injury is, in general, not a question of science or legal knowledge, but a question of fact for a jury. [Denying Webb v. Rome, etc., R. Co., 49 N. Y. 420, and Penn. R. Co. v. Hope, 80 Penn. St. 373.]

In error to the Circuit Court of the United States for the District of Iowa. The facts are stated in the opinion. For a fuller statement of them, see the report of the case in the court below, 1 Cent. L. J. 278.

Mr. Justice STRONG delivered the opinion of the court:

This was an action to recover compensation for the destruction by fire of the plaintiff's saw-mill and a quantity of lumber, situated and lying in the State of Iowa and on the banks of the river Mississippi. That the property was destroyed by fire was uncontroverted. From the bill of exceptions it appears that the "plaintiff alleged the fire was negligently communicated from the defendant's steamboat Jennie Brown to an elevator built of pine lumber and one hundred and twenty feet high, owned by the defendants, and standing on the bank of the river, and from the elevator to the plaintiff's saw-mill and lumber piles, while an unusually strong wind was blowing from the elevator towards the mill and lumber. On the trial it was admitted that the defendants owned the steamboat and elevator; that the mill was five hundred and eighty-eight feet from the elevator, and that the nearest of of the plaintiff's piles of lumber was three hundred and eighty-eight feet distant from it. It was also admitted that there was conflict between the parties plaintiff and defendant respecting the ownership of the land where the mill stood and where the lumber was piled, both claiming under a common source of title. The plaintiff had built the mill, and he was in the occupation of it, believing he had a right to be there."

Such having been the admissions, the court refused to allow the parties to try the title to the land upon which the mill and lumber had been placed, proof of title being in the opinion of the court immaterial. To this ruling the defendants excepted, and it is the first error they have assigned. We are unable to perceive any reason why the proof offered was not, as the circuit court held it to be, perfectly immaterial to the issue between the parties. By the law of the State of Iowa, "where an occupant of land has color of title thereto, and in good faith has made any valuable improvements thereon, and is afterwards in a proper action found not to be the rightful owner therof," he is entitled to payment or credit for the value of his improvements. Code of Iowa, sections 1976, 1977, 1978, 1979, 1980, and 1981. The effect of this statute is to make such an occupant practically the owner of his improvements, even though he be not the owner of the land on which they have been made. If, therefore, the title to the land had been shown to be in the defendents, the proof would not have affected the right of the plaintiff to recover compensation for willful or negligent destruction of the buildings and lumber. Nor could it have changed the degree of prudence and care which the defendants were bound to exercise in order to guard against injury to that property. The plaintiff is not to be regarded as a mere trespasser, wantonly thrusting himself or his property in the way of danger, a trespasser to whom the defendants owed a less degree of caution than would have been due if he had been the undisputed owner of the fee simple of the land on which the mill stood. We can not admit that the defendants owed no duty to the plaintiff even if he was occupying their land without their consent. An attempt was made during the argument to maintain that they had been found by the jury guilty only of an act of omission, and it was insisted that such an act would not give a right of action to the plaintiff if he was wrongfully in possession of their land. Neither the fact asserted nor the inference drawn from it can be conceded. The verdict of the jury was, 1st, that the elevator was burned from the steamer Jennie Brown; 2d, that such burning was caused by not using ordinary care and prudence in not landing at the elevator, under circumstances existing at that particular time; and 3d, that the burning of the mill and lumber was the unavoidable consequence of the burning of the elevator. The only reasonable construction of the verdict is that the fault of the defendants, in other words, their want of ordinary care and prudence, consisted in landing the steamer *at the elevator*, in the circumstances then existing, when a gale of wind was blowing towards it, when the elevator was so combustible and so tall. If this is not the meaning of the verdict, no act of negligence, of want of care, or of fault has been found. And this is one of the faults charged in the declaration. It averred that while the wind was blowing a gale from the steamboat towards and in the direction of the elevator, the defendants carelessly and negligently allowed, permitted, and counselled (or, as stated in another count, "directed") the steamboat to approach and lie alongside of or in close proximity to the said elevator. This is something more than non-feasance; it is positive action, the result, consequence, or outworking, as the jury have found it, of the want of such care should have been exercised.

It has been further argued in support of this assignment of error that the proffered proof of title should have been admitted because it tended to show contributory negligence on the part of the plaintiff. But we can not understand how it could have had any such tendency. Whether the mill stood on defendants' land, or on other land equally distant from the steamer and elevator, and in the same direction, its exposure to the fire was exactly the same.

A second exception taken in the court below, and here insisted upon, is that the court refused to permit the defendants to prove by witnesses who were experts, experienced in the business of fire insurance, and accustomed by their profession to estimating and calculating the hazard and exposures to fire from one building to another, and to fixing rates of insurance, that owing to the distance batween the elevator and the mill, and

the distance between the elevator and the lumber piles, the elevator would not be considered as an exposure to the mill or lumber, and would not be considered in fixing a rate thereon, or in measuring the hazard of mill or lumber.

This exception is quite unsustainable. The subject of proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment. In regard to such matters experts are not permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge and generally think alike. Not so in matters of common knowledge. Thus it has been held that an expert can not be asked whether the time during which a railroad train stopped was sufficient to enable the passengers to get off, (Keller v. R. R. Co., 2 Abbott, New York App., 480), or whether ir was prudent to blow a whistle at a particular time. Hill v. R. R. Co., 55 Maine, 438. Nor can a person conversant with real estate be asked respecting the peculiar liability of unoccupied buildings to fire. Muloy v. Ins. Co., 2 Gray, 541. In Durell v. Bederly, Chief Justice Gibbs said: "The opinion of the underwriters on the materiality of facts, and the effect they would have had upon the premium, is not admissible in evidence. Powell's Ev., 4 Ed., 103. And in Campbell v. Richards, 5 Barn. & Adol., 846, Lord Denman said: "Witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced if the parties had acted in one way rather than in another." See, also, Lord Mansfield's opinion in Carter v. Bochm, 3 Burrows, 1905, 1913, 1914, and Norman v. Higgins, 107 Mass., 494, in which it was ruled that in an action for kindling a fire on the defendant's land so negligently that it spread to the plaintiff's land and burned his timber, the opinion of a person experienced in clearing land by fire, that there was no probability that a fire set under the circumstances described by the witness, would have spread to the plaintiff's land was admissable.

The next exception is to the refusal of the court to instruct the jury as requested, that "if they believed the sparks from the Jennie Brown set fire to the elevator through the negligence of the defendants, and the distance of the elevator from the nearest lumber pile was three hundered and eighty-eight feet, and from the mill five hundred and twenty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for a recovery." This proposition the court declined to affirm, and in lieu thereof submitted to the jury to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected. All this is alleged to have been erroneous. The assignment presents the oft-embarrassing question, what is and what is not the proximate cause of an injury. The point prepounded to the court assumed that it was a question of law in this case, and in its support the two cases of Ryan v. The New York Central R. R., 35 N. Y. 210, and Kerr v. Penn. R. R. Co., 62 Penn. St. 353, are relied upon. Those cases have been the subject of much criticism since they were decided, and it may perhaps be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrongdoer, they have not been accepted as authority for such a doctrine, even in the states where the decisions were made. Webb v. The Rome, Watertown, and Ogdensburg Railroad Company, 49 N. Y. 420, and Pennsylvania Railroad Company v. Hope, 80 Penn. St. 373. And certainly they are in conflict with numerous other decided cases. Kellogg v. The Chicago and Northwestern Railroad Company, 26 Wis. 224; Perley v. The Eastern R. R. Co., 98 Mass. 414; Higgins v. Dewey, 107 Mass. 494; Tent v. The Toledo, Peoria and Warsaw Railroad Co., 49 Ill. 349.

The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. 2 Blacks. Rep. 892. The question always is, was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its greath heighth, and the proximity and combustible nature of the saw-mill and the piles of lumber. Most of these circumstance were ignored in the request for instruction to the jury. Yet it is obvious the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or non-feasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imprecepti-ble as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of

the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of the jury to look at this succession of events or facts and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.

If we are not mistaken in these opinions the circuit court was correct in refusing to affirm the defendants' proposition, and in submitting to the jury to find whether the burning of the mill and lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence or effect of the sparks from the boat, without the aid or concurrence of other causes not reasonably to have been expected. The jury found in substance that the burning of the mill and lumber was caused by the negligent burning of the elevator, an that it was the unavoidable consequence of that burning. This, in effect, was finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The judgment must, therefore be affirmed.

The judgment of the circuit court is affirmed.

HABEAS CORPUS—FALSE PRETENSES.

EX PARTE SNYDER.

Supreme Court of Kansas, July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

1. HABEAS CORPUS—JUDGE MAY INVESTIGATE CHARGE.—Under section 672, Gen. Stat., 1868, p. 763, the judge or court, issuing a writ of *habeas corpus* on a petition complaining that the person in whose behalf the writ is applied for, is restrained of his liberty without probable cause, may, in case there is no defect in the charge or process, summon the prosecuting witness, investigate the criminal charge, and discharge, let to bail, or re-commit the prisoner, as may be just and legal.

2. SAME—EVIDENCE.—On the hearing and determination of a cause, arising upon a writ of *habeas corpus*, before a judge or court investigating the criminal charge against a person committed by an examining magistrate for the offense of having obtained money or property by false pretenses, the prosecutor, when examined as a witness, may testify that he believed the pretenses, and, confiding in their truth, was induced thereby to part with his money or property.

3. FALSE PRETENSES.—It is not necessary, to constitute the offense of obtaining goods by false pretenses, that the owner has been induced to part with his property solely and entirely by pretenses which are false, nor need the pretenses be the paramount cause of the delivery to the prisoner. It is sufficient, if they are a part of the moving cause, and without them the defrauded party would not have parted with the property.

4. SAME.—A pretense which is false when made, but true by the act of the person making the same, when the prosecutor relies thereon and parts with his property, is not a false pretense within the statute.

5. SAME.—To hold a person for trial, who is charged with obtaining money or property by false pretense, it must appear that the pretense relied upon relates to a past event, or to some present existing fact, and not to something to happen in the future. A mere promise is not sufficient.

During the fall of 1876, A. J. Snyder was engaged with one J. M. Shores, in buying and shipping stock under the name of Snyder & Co. D. A. Painter & Son were live-stock brokers and commission merchants at Kansas City, Mo. Hood & Kincaids were bankers at Pleasonton, Linn County, Kansas, about eighty miles from Kansas City. On November 22, 1876, Painter & Son gave A. J. Snyder a letter of credit to Hood & Kincaids, to honor Snyder & Co.'s drafts on them for $4,000, on live stock consigned to them. On November 23, Snyder called on Hood & Kincaids, presented the letter of credit, and said he wanted the money to buy stock with. Hood refused, and said they were short of currency, but would send to Kansas City for currency, but could not see to the shipping of stock. On the 23d or 24th, Snyder again called at the bank and wanted to get the money on a telegram from Painter & Son, to the effect that Hood & Kincaids should honor Snyder & Co.'s draft to pay on stock for $4,000, and stated he "had bought the pick of a large lot of cattle—about 100—and wanted money to pay for them." Snyder got no money at this time. He then went to Fort Scott, about thirty-five miles below Pleasonton, and bargained with one Glasscock for eighty steers, thirty-seven or thirty-eight to be delivered the next Monday, and the balance the middle of February. On the 25th of November he returned to Pleasonton, and called at Hood & Kincaids' bank for some money. On this day Painter & Son telegraphed to H. & N., at the instance of Snyder, that they would honor Snyder & Co.'s draft for $4,000." After H. & N. received this, Snyder obtained of them $1,500 in currency, and a check duly certified for $1,500, and Snyder drew a draft on Painter & Son for $3,000, signed it Snyder & Co., and delivered it to the bank. On the 28th of November Snyder & Glasscock had some trouble about the cattle, and the contract for their purchase was broken off. Snyder then returned to Pleasonton, and called at the bank of H. & K. and told Hood he wanted $850 to finish paying for the stock he had bought, and H. & K. gave him the $850 check, and Snyder delivered another draft for that sum on Painter & Son. The drafts on Painter & Son were protested, and could not be collected, on account of their limited financial condition. Snyder & Co. were also worthless. No cattle were shipped to Painter & Son, and Snyder retained all the money he got of the bank. Snyder always promised, before getting the money and checks, to ship the stock to Painter & Son. Snyder was arrested in Linn County, Kansas, for obtaining the $1,500 in currency and the $1,500 check, on November 25, on false pretenses, was examined and committed by the magistrate to appear at the next term of the district court, to answer the said charge. A writ of *habeas corpus* was sued out of the supreme court, and a hearing had therein.

Messrs. *Snoddy, Buchan & Ely*, for the petitioner; Messrs. *Allen & Biddle*, for the state.

HORTON, C. J.:

The questions presented in the case for our consideration will be disposed of by us in the order in which they were raised. After the return of the sheriff had been made and the reply thereto filed, the counsel for the respondent objected to the summoning of the prosecuting witness, and asked that the petitioner be remanded to the custody of the officer, as it appeared from the record, that upon the complaint made that a criminal offense had been committed, a warrant describing the offense had been issued, the prisoner arrested, a preliminary examination duly had before the proper officer, and a finding made that the petitioner

was guilty as charged in the complaint and warrant; that therein bail had been fixed at $5,000; that the petitioner had not offered any bail, and had been legally committed for trial, and no question was made on account of any defect in the charge or process.

Under sec. 671, ch. 80, Gen. Stat. 763, it is expressly provided, "that no court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, when the party is in custody upon any process issued on any final judgment of a court of competent jurisdiction, or upon a warrant or commitment issued from the district court, or any other court of competent jurisdiction, upon an indictment or information." An order of commitment to hold a prisoner for trial, issued by a magistrate, before whom a person whom a person is brought for examination, upon a charge of having committed an offense, after such examination is concluded and a finding made that it appears that the prisoner is guilty as charged in the complaint and warrant, is not a process issued on any final judgment of a court of competent jurisdiction; nor is such a commitment included in any process named in section 671. Hence, there is no prohibition in said section to prevent a court or judge from inquiring into the legality of the imprisonment of a person under a commitment of an examining magistrate.

Section 672, Gen. Stat. 1868, 763, provides: "No person shall be discharged from an order of commitment issued by any judicial or peace officer for want of bail, or, in cases not bailable, on account of any defect in the charge or process, or for alleged want of probable cause; but in all such cases the court or judge shall summon the prosecuting witnesses, investigate the criminal charge, and discharge, let to bail or recommit the prisoner, as may be just and legal, and recognize witnesses when proper." Under this section we hold that when a writ of *habeas corpus* issues on a complaint of illegal imprisonment, for alleged want of probable cause, the judge or court issuing the writ may, even in cases where there is no defect in the charge or process, summon the prosecuting witness, investigate the criminal charge and discharge, let to bail or recommit the prisoner, as may be just and legal. This section gives a party, committed for a crime by an examining magistrate, an appeal from his commitment by virtue of the writ of *habeas corpus*. The People v. Tompkins, 1 Parkers (N. Y.) Crim. Rep. 224, 240. Thereupon the court overruled the objection to the hearing of evidence in the case, and the motion to remand upon the record. The court, however, ordered, on its own motion, that the petitioner should amend his reply by setting out therein, as fully and specifically as possible, the testimony given by the various witnesses before the examining magistrate, and named in the return of the sheriff.

The better practice is, where a petition is presented for a writ of *habeas corpus*, for alleged want of probable cause, to embody in the petition all of the testimony taken before the examining magistrate. When this evidence has been reduced to writing by the magistrate, or under his direction, a copy thereof should be obtained with the certificate of the magistrate thereto. When such testimony is not reduced to writing, there usually is but little difficulty in stating the material and important matters testified to. Upon the hearing of the case on the merits, the petitioner objected to the witness John Hood testifying that he was induced to part with the $1,500 and the certified check, on the statements and representations of Snyder, on the ground that it was incompetent, and was calling for the secret mental emotions of the witness. The objection was not well taken. This was a material fact to be established. It was proper for this court to know what influence the representations of Snyder had upon the witness. If they had none at all, the prosecution must have failed. "The fact was sought after, and not the opinion of the witness." People v. Herrick, 13 Wend. 87; People v. Sully, 5 Parker (N. Y.) Crim. Rep. 142; People v. Miller, 2 Parker (N. Y.) Crim. Rep. 197; Thomas v. The People, 34 N. Y. 351. Objections were also taken to Hood's testimony that he believed the representations made to him by Snyder on the 23d, 24th, 25th and 28th of November. The objections were overruled, and, for the reasons above stated, we think the evidence competent. It is indispensable to the consummation of the crime of obtaining money or property under false pretense, that the person who has been induced to part with his money or property thereby must believe the pretense is true, and, confiding in its truth, must, by reason of such confidence, have been cheated and defrauded. We do not mean by this ruling that such evidence is the best, nor the most reliable; nor that it is necessary for the prosecutor to state he believed and relied upon the pretense. All of this may be inferred. We simply hold the evidence admissible. The material question, however, in this case is whether, on the evidence submitted to us, an offense is made out against Snyder for false pretense, within the statute, in his obtaining from Hood & Kincaids, on November 25, the $1,500 in currency, and the certified check of $1,500.

The counsel for the petitioner contended that there was no evidence of the procuring of the money or check by any false pretense: First, inasmuch as Hood, at the time he let Snyder have the money and check on the 25th of November, had an absolute order in the form of a telegram from Painter & Son to honor Snyder & Co.'s drafts for $4,000, and had previously refused to pay the money on a letter of credit, which he construed as requiring him to see to the shipping of the stock to Painter & Son, it is conclusively shown that such telegraphic order of Painter & Son was the sole inducement by which the money and check were parted with by Hood. Second, that the representation made by Snyder to Hood, that he had bought the pick of a large lot of cattle—about 100 head—was true on the said 25th, when the money and check were obtained, and that the statement that the cattle would be shipped to Painter & Son, at Kansas City, was a representation or assurance in relation to a future transaction, and did not amount to a statutory false pretense. As to the first proposition of the counsel of the petitioner for his discharge, we answer that we are not satisfied that Hood parted with the money and check solely on the telegram of credit of the 25th. The testimony tends to show that he was induced to part with the property in controversy, partly on that telegram, partly on the representation of Snyder that he had bought abput 100 head of cattle, and partly on the statement that he would ship the cattle to Painter & Son. In an examination of this character, we are not to pass absolutely on the guilt or innocence of the prisoner; if we shall find an offense has been committed, and there is probable cause to believe the prisoner guilty thereof the prisoner should be committed for trial.

As different motives were assigned by the prosecutor as operative in producing the delivery of the money and check to Snyder, the examining magistrate, and this court is only to ascertain that there is probable cause to believe that the pretenses proved to have been false and fraudulent if within the statute, were a part of the moving causes which induced Hood to part with the property, and that Snyder would not have obtained the same if the false pretense had not been superadded to the telegraphic order of Painter & Son of November 25, to authorize the holding of Snyder for trial. It is not necessary to constitute the offense of obtaining goods by false pretenses, that the owner should have been in-

duced to part with his property solely and entirely by pretenses which were false, nor need the pretenses be the paramount cause of the delivery. It is sufficient if they are a part of the moving cause, and without them the prosecutor would not have parted with the property. People v. Haynes, 14 Wend. 547. This leads us to examine the second proposition upon which the counsel for the petitioner claims his release, and to consider the representations made by Snyder, "that he had bought the pick of a large lot of cattle, about 100 head," and that "he would ship them to Painter & Son." The first representation was substantially true, when the money and check were obtained, on the 25th of November. At that time the cattle had been contracted for by Snyder with Glasscock, and a part of the consideration paid. This representation, when made on the 23d or 24th of November, was false; on the 25th it had become true. Is a pretense, which was false when made, within the statute if true when the property is parted with? We think not. The pretense employed is only the means by which the offense is perpetrated. The substance of the offense consists in the obtaining of the property, and thereby with a fraudulent intent, depriving the lawful owner of that which properly belongs to him. If a party by his own acts makes the false representation good before obtaining the property, there is no consummation of the crime, and there is no attempt; for it follows, that when there is a change of purpose on the part of a person to obtain property by a false pretense, before any other wrongful act is committed than the making of the false pretense, the crime of the attempt is taken away. The fact that in this case Snyder never abandoned the scheme to defraud some one, does not militate against the conclusion that the pretense must be false in fact when the property is parted with. How can it be said that Hood relied upon a false representation as to the purchase of the cattle, when he delivered the money and check, if at that time the representation had become true? No property was parted with by Hood on the 23d or 24th. The representation, then, made by Snyder as to buying the cattle was true the 25th, and before he obtained the money or check; and if he is to be held for the commission of obtaining property under false pretenses, it must be upon some other one than the representation on the 23d or 24th as to having bought the pick of a large lot of cattle.

As to the representation of Snyder that he would ship the cattle, to Painter & Son at Kansas City, we follow authority, in holding such a statement not a statutory false pretense.

The false pretense relied upon to constitute an offense under the statute, must relate to the past event, or to some present, existing fact, and not to something to happen in the future. A mere promise is not sufficient. R. v. Young, 3 T. R. 98; R. v. Lee L. & C. 309; Commonwealth v. Drew, 19 Pick. 179; State v. Evers, *et al.* 49 Mo. 542; Dillingham v. State, 5 Ohio State, 280; Burrow v. State, 12 Ark. 65; State v. Magee, 11 Ind. 154; State v. Green, 7 Wis. 676.

The representation that the cattle would be shipped to Painter & Son, related to an event which was thereafter to happen,—it was a promise, or assurance of a future transaction. Upon the evidence, we are therefore compelled to say, that as the only offense charged in the complaint, and in the warrant against Snyder was the obtaining of $1,500 in currency, and the certified check of $1,500 on November 25th, as therein stated, and as the order of commitment was issued on the finding of the examining magistrate that there was probable cause to believe Snyder "guilty as charged in the complaint and warrant," there is no legal authority for holding the petitioner in custody and he must be discharged. It is perhaps unnecessary to add that in point of moral turpitude, Snyder is as guilty in obtaining the property of Hood & Kincaids on the 25th of November, on a false promise, if such be the fact, as if such pretense was within the statute. The criminal law, however, can not reach the perpetrator of every fraud. "The statute may not regard naked lies, as false pretenses." We have intentionally abstained from commenting upon the transactions of the 28th of November, when Snyder is alleged to have obtained a certified check of $850, because there is nothing in the proceedings before the magistrate or in this court, to prevent the petitioner from being arrested, if any complaint is made, therefor. Whether a crime has been committed in that regard, and whether there is probable cause to believe the petitioner guilty thereof, may be a matter of future examination and judicial determination. In this investigation, the testimony of facts subsequent to the 25th, was received by us only to explain the transactions of the 25th of November, and to shed light upon the intent of Snyder. That the force of this decision may not be misconstrued, we may properly say that evidence shows there was no collusion between the firm of Painter & Son and Snyder, and that the purchase of the cattle by Snyder of Glasscock on the morning of the 25th, was made in good faith. It is evident, however, that Snyder never intended to ship any of the cattle to Painter & Son, and all his statements to that effect were in pursuance of his scheme, to successfully carry out his fraudulent purpose. Let the petitioner be discharged.

All the justices concurring.

WIFE'S SEPARATE ESTATE.

LISHEY v. LISHEY.*

In the Chancery Court at Nashville, Tennessee, April Term, 1874.

Before HON. W. F. COOPER, Chancellor.

1. WIFE'S SEPARATE ESTATE—INCOME RECEIVED BY HUSBAND.—If the husband and wife, living together, have for a long time so dealt with the separate income of the wife as to show they must have agreed that the husband, who was himself the trustee, should use it for family purposes, equity will not require him to account therefor until her consent is revoked.

2. SAME—HUSBAND TRUSTEE—CHANGE OF PROPERTY.—Where the husband is trustee for the wife, either expressly or by implication of law, a change in the form of the trust property made by him will not, without clear evidence of intention on the part of the wife to that effect, destroy the trust.

John Trimble, for complainant; *E. H. East, N. S. Brown, Thos. H. Malone*, for defendant.

THE CHANCELLOR:—Bill filed April 4, 1873, for divorce from bed and board, and alimony, and also to require the defendant to account for the separate property of the complainant. The case has been heard on bill, answer, and the proof offered on behalf of complainant, the defendant having declined to introduce any evidence.

The parties intermarried in December, 1840, and have continued to live together until shortly before the filing of the bill, when the complainant voluntarily left the defendant and their common home. They have had no children. The proof shows that they are both industrious, economical, and good-tempered, esteemed by their neighbors, and in the enjoyment of a moderate competence.

As to that part of the bill which seeks an account of

*We reprint this well-considered case from advanced sheets of 2 Tennessee Chancery Reports.—ED.

the complainant's separate estate, the answer admits, and the proof shows, that in the year 1846 the complainant received in this court the sum of $900, which was, by the decree, settled upon her, to her sole and separate use; that afterwards, by an order in the same cause, on the 27th of November, 1848, this fund was loaned to the defendant, upon his executing a mortgage to secure the same, which was done; that sometime in the year 1840, the complainant's father made a deed of gift conveying to the complainant, to her sole and separate use, several slaves; that about the year 1850 defendant sold one of these slaves for $500, receiving the purchase-money; that the other slaves were retained by the complainant and defendant until they were emancipated by the war.

Under these circumstances, the liability of the defendant for the two sums of $900 and $500 has not been seriously controverted, and probably could not be. He is, as to the first of these sums, an express trustee by the decree and mortgage executed in pursuance thereof, and nothing appears tending to show any change in the character of the holding. The law made him a trustee for his wife of the slaves conveyed to her separate use, and a change in the form of the trust property, without anything more, would not denude him of the trust. He would still be a trustee of the fund to the wife's separate use. The law in such cases requires clear evidence of an intent upon the part of the wife to change the character of his holding and destroy the trust. Rich v. Cockell, 9 Ves. 375; Gore v. Knight, 2 Vern. 535; Hughes v. Wells, 9 Hare, 765; Darkin v. Darkin, 17 Beav. 578. See, also, Young v. Jones, 9 Humph. 55; and Bottoms v. Corley, 5 Heisk. 10.

The proof shows that the husband has continued to hold the fund in question, without any demand on the part of the wife for the interest, until the filing of the bill, and that he has alone contributed to the support of the family. A wife having property settled for her separate use is entitled to deal with the income as she pleases. If, therefore, she insists upon her rights, the court will give her arrears of income from the time when she required the income to be paid to her. Countess of Warwick v. Edwards, 1 Eq. Ca. Abr. 140, pl. 7; Ridout v. Lewis, 1 Atk. 269. There are some cases which seem to imply that the wife will, in any event, be entitled to recover a year's income. Aston v. Aston, 1 Ves. 267; Townsend v. Windham, 2 Ves. 7; Peacock v. Monk, 2 Ves. 190; Brodie v. Barry, 2 V. & B. 39; Parkes v. White, 11 Ves. 225; Burdon v. Burdon, 2 Madd. 286, in note; Thrupp v. Harman, 3 M. & K. 513. Upon examination it will be found that, in each of the first three cases, the rule is stated by Lord Hardwicke, in the shape of a *dictum* touching arrears of pin-money; and, in the next two cases, there is a similar *dictum* of Lord Eldon, a *dictum* repeated by Sir William Grant in Parker v. Brooke, 9 Ves. 588. In Burdon v. Burdon there seems to have been an actual ruling, in accordance with these *dicta*, by Sir Thomas Sewell, Master of the Rolls, and the rule was acted upon without objection, in Thrupp v. Harman. It will also be found that no reason is assigned for the rule in any of these cases. I am inclined to think that these *dicta* and rulings may be traced back to what was said by the commissioners of the great seal, in Offley v. Offley, Prec. Ch. 26, decided in 1691. The second doubt in that case was this: "On the marriage of Mrs. Offley with her husband there was a term created for raising £200 per annum for her pin-money, which money had been constantly paid to her by her husband's steward, except only the last year before his death, which was in arrear; and in the settlement was a covenant on the part of the husband for the payment of it; and the court were of opinion that this, being an arrear only for one year, and there being a covenant for the payment of it, should be such a debt as should be charged on the trust estate. *Secus*, if it had been in arrear for many years." This decision, it is obvious, was clearly right, the husband having never been allowed to retain and use the annual pin-money, and there being no ground for implying either an agreement or waiver by the wife in favor of the husband. And what Lord Hardwicke and Lord Eldon meant in their *dicta* was that, even where there was no acquiescence by the wife, she should not go back more than one year *in a claim for arrears of pin-money*. It was never intended to lay down such a rule in relation to the income of the wife's separate estate. For, although the master of the rolls is reported as saying, in Burdon v. Burdon, "that there was no difference between pin-money which may come out of the husband's estate, and what may be settled for the separate use of the wife out of her own estate," which is true in some respects, yet there is a difference in the nature of the two interests, and in the reasons which underlie the adjudications. Pin-money is regarded in equity as payable *de anno in annum* for the pharaphernalia of the wife, and during such time as the husband has provided her with clothes and other necessaries, she is barred of recovering any arrears. Howard v. Digby, 2 Cl. & Fin. 643. In the case of separate estate the inference in the husband's favor is derived from, and must be based upon, some evidence of consent on the part of the wife that her property should be appropriated by him. See note of Steuart Macnaghten to Christmas v. Christmas, Sel. Ca. Ch. 20. Where such consent exists there is not the least reason for going back one year. And, consequently, there is point in the reporter's question, in the note to 2 Madd. 286: "If the husband is permitted to receive the wife's separate estate, and he applies it in support of the family, why should he be accountable even *for one year?*"

The leading case on this branch of the subject is Powell v. Hankey, 2 P. W. 82. The wife, before her marriage, conveyed her real estate to trustees, to such uses as she, notwithstanding her coverture, should appoint, and assigned all her mortgages and bonds to her separate use; besides which she had £200 exchequer annuities, assigned by her intended husband to her trustees, in trust for herself, for her jointure. Here were separate estate, and jointure of the husband's property for maintenance or pin-money. After the marriage the wife constantly permitted the husband to receive the interest of all these securities and bonds, without making any complaint, either to the debtors that paid the money or to her trustees.

"With regard to any of the interest on the mortgages and securities received by the husband during the coverture," says the Lord Chancellor Macclesfield, "as it was against common right that the wife should have a separate property from her husband, (they being both, in law, but as one person), so all reasonable intendments and presumptions were to be admitted against the wife in the case; and, forasmuch as she had, for ten years together, permitted the husband to receive this interest without making the least objection, either to the husband, or to the debtors who paid the money, or to her own trustees, it should, therefore, be intended that she consented to the husband's receipt of this interest; that a contrary construction might have been a hardship upon the husband, who (probably) depended on the wife's permitting him to receive this as a gift; and, on such presumption, might have lived in a more plentiful manner, the comfort whereof the wife must have shared in; and if she, ten or twenty years afterwards, should be allowed to make her husband a debtor for all this money, (which she might do by the same reason as now, after his death, to charge his executors), this might ruin the husband,

or, in case of his death, prove equally prejudicial to his children."

"As to the case of separate maintenance," continues the report, "the court took notice that the husband's maintaining the wife barred the wife's claim in respect thereof; so, if there should be a provision for the wife's separate use for clothes, if the husband finds those clothes, the wife's claim will be thereby barred; that, in case of the wife's separate maintenance, if this be not demanded by her, she will be concluded, even where she has no other person to demand it of but her husband, which, probably, she might be afraid to do; but that the principal case was not so strong; in regard there the wife might have demanded it from her own trustees; neither was it material whether the allowance or maintenance money was provided out of that estate which was originally the husband's, or (as in the principal case) out of what was the wife's own estate, for that in both cases, the wife's not having demanded it for several years together, should be construed a consent from her that the husband should receive it."

The practical good sense of these rulings met the approval of Lord Chancellor King in Thomas v. Bennet, 2 P. W. 341, a case of pin-money, and in Christmas v. Christmas, Sel. Ca. Ch. 20, a case of separate estate. Lord Talbot followed the lead in Fowler v. Fowler, 3 P. W. 355, a case involving arrears of pin-money. In Ridout v. Lewis, 1 Atk. 269, Lord Hardwicke, while ordering an account under the circumstances, says: "I allow that it is a general rule, when a wife accepts a payment short of what she is entitled to, or lets the husband receive what she has a right to receive to her separate use, it implies a consent in the wife to submit to such a method, where the husband and wife have cohabited together for any time after."

The weight of authority, in accordance with these rulings, undoubtedly is that, if the husband and wife, living together, have for a long time so dealt with the separate income of the wife as to show that they must have agreed that it should come to the hands of the husband to be used by him, (of course for their joint purposes), that would amount to evidence of a direction on her part that the separate income, which she otherwise would be entitled to, should be received by him. And this if the husband be himself trustee. Caton v. Rideout, 1 Mac. & G. 599. The wife's consent to the husband's receipt of the income *de anno in annum* is presumed, and that such consent continues until revoked by something expressed or fairly implied. Squire v. Dean, 4 Bro. C. C. 326; Smith v. Lord Camelford, 2 Ves. Jr. 716; Milnes v. Busk, 2 Ves. Jr. 496; Dalbiac v. Dalbiac, 16 Ves. 126; Bartlett v. Gillard, 3 Russ. 155; Buckeridge v. Glasse, Cr. & Ph. 137; Breesford v. Archbishop of Armagh, 13 Sim. 643; Payne v. Little, 26 Beav. 1; Gardner v. Gardner, 1 Giff. 126; Kelly v. Dawson, 2 Mol. 87; Methodist Episcopal Church v. Jacques, 3 Johns. Ch. 79.

No claim of interest on the part of the wife is shown in this case to have been made until the filing of the bill. The facts bring the case precisely within the settled rule. The defendant will, therefore, be charged with interest only from the filing of the bill, and with the principal sums. To this extent the equity of the bill is clear.

The complainant seeks, in addition, a divorce from bed and board.

[The opinion of the chancellor on this part of the case, involving only questions of fact, is omitted.]

THE *Texas Law Journal* refers to Cate, the author of the slanders against Judge Dillon, as one of the counsel in the case. This is an error. All the counsel in the case, including Cate's own lawyer, concurred in exonerating the judge.

BANKRUPTCY—ACCOUNTING FOR LOSSES IN BUSINESS—DEFICIT.

IN RE PELTASOHN.

United States Circuit Court, Eastern District of Missouri.

Before HON. JOHN F. DILLON, Circuit Judge.

WHERE A DEFICIT is shown in the assets of a bankrupt's estate, he must account for it by a satisfactory explanation, or pay the amount of the deficit to the assignee.

The bankrupts were wholesale millinery merchants in St. Louis. The assignee filed a petition in the district court representing that the bankrupts had fraudulently withheld from him goods and property to the amount of $48,000, and asking an order on the bankrupts to show cause why they should not turn over that amount of property to him. The order issued, and the bankrupts appeared and filed a sworn answer denying the charge, and stating that they had delivered to the assignee all their property and effects. The matter was heard by the district court upon the examination of the bankrupts before the register (admitted in evidence without objection, as far as the record discloses), and upon the testimony of various witnesses produced by the assignee and by the bankrupts. The testimony, including the examination of the bankrupts, covers about 600 written pages. The bankrupts, or their wives, or the persons to whom they alleged that money had been paid just preceding their failure, were not examined as witnesses, or their depositions taken. After a hearing, which occupied several days, the district court found as a fact that the said bankrupts "have secreted, concealed, and prevented from coming to their assignee herein, property to the value of $7,762.22, belonging to the said estate, and thereupon ordered the bankrupts to pay said sum to the assignee on or before the eighth day of September, 1875." The bankrupts, on the eighth day of December, A. D. 1875, filed their petition in this court for a review of the said order. An answer to this petition was filed by the assignee, and the matter, by stipulation and agreement, was to be heard in the circuit court upon the same proofs upon which it was determined by the district court.

By consent, the case was, at the March term, 1876, of this court, referred to S. D. Thompson, Esq., one of the masters in chancery of this court, to report upon the law and the facts. The master has filed an elaborate report, in which he states that he has given to the case a thorough examination, and seems to be of opinion that the finding of the district court against the bankrupts was for a sum too small instead of too large, but as the assignee had prosecuted no proceedings for review, he recommends an affirmance of the order below, with costs, against the bankrupts. Exceptions were taken by the bankrupts to the master's report, on the ground that it is not sustained by the proofs, and on these exceptions the cause was submitted to the court.

N. Myers, for the bankrupts; *A. Binswanger*, for the assignee.

DILLON, Circuit Judge:

It is an admitted fact that at *cost* price the bankrupts had on hand, on January 1, 1873, goods to the amount of $41,740.61. They failed in November of that year. Between January 1, 1873, and their failure, they purchased goods to the amount of $81,589.53, making stock to be accounted for $123,330.14. These sums are shown by the bankrupt's books. The books show sales, for cash and on credit, during this period, to the amount

of $72,503.95, at *sale* prices. If sold without loss or profit, the bankrupts ought to have had on hand at their failure, goods to the amount of $50,826.19. The amount actually turned over by the bankrupts to the estate in bankruptcy was $16,500 at cost price, or, including fixtures, $18,000. The difference, viz., $34,326.19, or, if fixtures be deducted, $32,826.19, is to be accounted for.

The bankrupts attempt to account for this large deficit by showing a great decline in the value of goods of this character between January 1 and November 1, and that they had to sell at great loss. Undoubtedly, the old stock—that is, the stock on hand January 1—was not worth its cost price, and sales from that were made, on the average, greatly below cost; but it is very doubtful whether there was much, if any, loss, as likely, indeed, that there was a profit on the goods sold from the new purchases. On the whole, I am not satisfied with the explanations offered for this large and striking deficit, and I think the district court and the master were well justified in reaching the conclusions they did. Certain circumstances, pregnant with suspicion, strongly support this conclusion. I mention these without dwelling upon them.

The change, during the time they had a book-keeper, of their system of book-keeping from double to single entry; the loss or non-production of two important books—"Bills receivable and payable," and the "Stock or sales' book," by no means satisfactorily accounted for; the alleged increase by one-half of family expenses during 1873, and taking money therefor, without any real increase being shown; the alleged sending of money to Europe to poor relations, and payments to a relative in this country, not otherwise shown to be true than by the unsupported statement of the bankrupts—this at a time when they were claiming to be anxious to reduce expenses, and when they were embarrassed; and particularly the statement of Peltasohn, that his wife had $5,000 or $6,000, and had had since 1871, or before that, which she kept in her house in bank-bills and had never invested—the profits, as he alleged, of business which she had conducted on her own account, and which I must say, under the circumstances, is very improbable; and the further fact that since the bankruptcy the bankrupts have gone into business as the professed agents of their wives.

In short, such a case was made against the bankrupts as to call upon them to explain these circumstances of suspicion, and they have not done so. They were not even examined as witnesses on their own behalf in the district court.

The exceptions to the master's report should be disallowed, and an order should be here entered affirming the order of the district court, with costs, including the fee of the master of $250 (not excepted to; and that a mandate go to the district court to proceed with the execution of the order complained of, the same as if the petition for review thereof had not been brought.

ORDERED ACCORDINGLY.

NOTE.—The opposition to the Bankrupt Law, as it now stands, has come from the creditor-class, and there is, perhaps, but little doubt that the reasons for the opposition are substantial; yet if the creditors of an estate would urge those provisions of the statute which will secure them their rights, in all proper cases, except in case of composition proceedings, the act would certainly not be without efficacy.

The provisions referred to are sections 5110, 5132 and 5101 of the Revised Statutes of the United States.

In Re Salky v. Gerson, 11 N. B. R. 515; S. C. 7 C. L. N. 195, Judge Drummond held, affirming Judge Blodgett's decision in the same case, 11 N. B. R. 423, under the provision of § 5104, Rev. Stat. U. S., § 26 of the Act of 1867, that the court had authority to imprison bankrupts for failure to give a satisfactory account and make a full disclosure respecting their property. The counsel for the debtors there contended that if the answers to the inquiries concerning their property were untrue, the creditors might resort to a criminal prosecution. The court replied that criminal prosecution does not pay the claims of the creditors.

In *Re* Jacobi, unreported, Judge Caldwell committed to jail, at Little Rock, Arkansas, a bankrupt for not paying over to her assignee the sum of about $12,000, a deficit of that amount not having been by her satisfactorily accounted for. The bankrupt, after being imprisoned for some time, was taken before Circuit Judge Dillon, at Davenport, Iowa, on a writ of habeas corpus, who modified the order of the district court as to the amount to be paid over, as not having been satisfactorily explained, and remanded the bankrupt.

The case of Peltasohn, above reported, is only one of many where creditors have been imposed upon by bankrupts, because the bankrupts supposed the act to be a shield for their fraudulent contrivances, and the court clearly lays down the rule as to how a true account ought to appear; and in the absence of such an account, to what the act subjects the bankrupts. N. F.

LANDLORD AND TENANT — INJURY TO STRANGER.

NELSON v. THE LIVERPOOL BREWERY COMPANY (LIMITED.)*

English High Court, Common Pleas Division, June 7, 1877.

The owner of premises demised to a tenant, is not liable for an injury sustained by a stranger owing to the premises being out of repair, unless he has contracted to do the repairs, or has let the premises in a ruinous and improper condition. In all other cases the tenant is *prima facie* liable.

The facts of the case, as stated in the judgment of the court, were as follows:

This was an action brought in the Liverpool Passage Court, by the plaintiff against the defendants, to recover damages for injuries occasioned by the defendant's negligence. A verdict was found for the plaintiff for £60, leave being given to the defendants to move to set aside the verdict and enter a nonsuit, on the ground that the facts proved by the plaintiff disclosed no cause of action against the defendants. The facts, shortly, were as follows: One Farragher became the tenant to the defendants, under an agreement dated the 10th of June, 1875, of a certain public house, the property of the defendants, Farragher agreeing "to do all necessary repairs to the said premises, except main walls, roof, and main timbers." There was no agreement to repair by the landlords, and it was admitted that the premises were not out of repair when Farragher became tenant. The plaintiff was a barman in the employ of Farragher, and on the 23d of December, 1875, was knocked down by a chimney-pot falling on him from the premises in question as he crossed the yard, whereby he was seriously injured. The chimney-pot had been out of place for three weeks to the plaintiff's and Farragher's knowledge, and Farragher had given the defendants notice that it was overhanging the street, and had received from them a reply to the effect that they had given instructions that it should be looked to; the defendants had, moreover, sent a man to look at it. Evidence of a custom for landlords to do external repairs, when there was no express agreement on the subject, was given. The judge left several questions to the jury which, so far as material, were as follows: First, whether, upon the evidence of usage, the defendants were liable to repair? to which the jury replied in the affirmative; secondly, whether the chimney-pot was part of the main wall? to which they gave a similar

*Weekly 25 Reporter, 877.

reply; thirdly, whether the defendants were guilty of negligence, and whether, by reason thereof, the accident happened? which was also answered in the affirmative.

Potter, for the plaintiff, showed cause.

Previous to the accident there had been a severe gale, by which the chimney-pot in question had been displaced. It remained in this condition for three weeks, when Farragher, the tenant, wrote to the defendants complaining that it was in a dangerous state. The defendants replied that it was being attended to, but two days afterwards the accident occurred. There was clear evidence of negligence in the defendants to support the findings of the jury, and the judge held the defendants liable to repair on two distinct grounds, viz. (1) on the ground of usage, and (2) by reason of their conduct in sending a person to do the repairs. He cited Payne v. Rogers, 2 H. Bl. 349; and Todd v. Flight, 9 C. B. N. S. 377.

W. R. Kennedy, for the defendants, supported the rule.

It is difficult to see that the defendants could be liable to Farragher, there being no express covenant in the agreement by which they take on themselves the liability to do the repairs. Woodfall's Landlord and Tenant, 9th ed., p. 488. The premises were not let in a dangerous state, and there is therefore no liability, unless a contractual liability on the part of the landlord. Merely sending to do the repairs could not impose such a liability. The plaintiff, moreover, being the servant of the occupier, must be considered to have taken the risk of the house being dangerous. He cited the following cases, in addition to those mentioned in the judgment: Seymour v. Maddon, 16 Q. B. 326; Couch v. Steel, 2 W. R. 170; Riley v. Baxendale, 9 W. R. 347; Southcote v. Stanley, 1 H. & N. 247, 5 W. R. C. L. Dig. 203; Indermaur v. Dames, 14 W. R. 586, on app. 15 W. R. 434; Assop v. Yates, 2 H. & N. 768, 6 W. R. C. L. Dig. 61. *Cur. adv. vult.*

The judgment of the court (DENMAN and LOPES, JJ.) was delivered by LOPES, J., who, after setting out the facts as above, continued:

We are of opinion, on the facts proved, that the plaintiff has no cause of action against the defendants. We think the custom, of which evidence was given, for landlords to do external repairs, when there is no express provision to that effect, was not such as could be incorporated in the agreement, nor such a custom as could create any liability in the defendants; it appeared to be a practice amongst landlords to repair for their own interest, and not a uniform, certain and well-established usage.

We think there are only two ways in which landlords or owners can be made liable, in the case of an injury to a stranger by the defective repair of premises let to a tenant, the occupier, and the occupier alone being *prima facie* liable; first, in the case of a contract by the landlord to do repairs, where the tenant can sue him for not repairing; secondly, in the case of a misfeasance by the landlord, as, for instance, where he lets premises in a ruinous condition. In either of these cases we think an action would lie against the owner. See Payne v. Rogers, 2 H. Bl. 349; Todd v. Flight, 9 W. R. 145, 9 C. B. N. S. 377; Russell v. Shenton, 3 Q. B. 449; Pretty and wife v. Bickmore, 21 W. R. 733, L. R. 8 C. P. 401.

In the present case, however, there is no contract by the defendants, the landlords, to do repairs, and it is admitted that the premises were not out of repair when Farragher became the tenant. We think, therefore, the rule should be made absolute to enter a nonsuit. Rule absolute.

BANKRUPT LAW — TIME WITHIN WHICH BANKRUPT MAY BE DISCHARGED.

IN RE CROSE.

United States District Court, for the District of Indiana, September 25, 1877.

Before HON. WALTER Q. GRESHAM, District Judge.

BANKRUPT LAW—DISCHARGE OF DEBTOR—CONSTRUCTION OF STATUTE.—The words "before the final disposition of the cause," in the Amendment to the Bankrupt Act, approved July 26, 1876, mean before the assignee has completed his administration and received his discharge from the register; and where the assignee was so discharged November 1, 1876, and the bankrupt applied for his discharge September 17, 1877,—*held*, the application came too late and must be rejected.

GRESHAM, J.:

In this case the bankrupt filed his petition for discharge September 17, 1877. The assignee in the cause had rendered his final account, and received his discharge from the register, November 1, 1876.

The question in the case is made under the amendment to the bankrupt act approved July 26, 1876. Statutes at Large, vol. 19, p. 102. That amendment provides that section 5108 of the Revised Statutes be amended to read as follows: "At any time after the expiration of six months from the adjudication of bankruptcy, or, if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts." The amended provision is expressly extended to "all cases heretofore or hereafter commenced."

The original provision on this subject, as in the section cited, differs from the amendment in this: Instead of the words, "before the final disposition of the cause," the original act reads in their stead, "within one year from the adjudication of bankruptcy." So that originally the bankrupt was required to apply for his discharge within a year after the adjudication, whereas, by the amendment, he is required to apply "before the final disposition of the cause."

What is meant in this amendment, by the final disposition of the cause, can not be a matter of doubt. But two principal objects are contemplated by a proceeding in bankruptcy: 1. The administration and distribution of a bankrupt's estate. 2. The discharge of a bankrupt from his debts. It is plain the amendment does not contemplate the latter as the final disposition of the cause, for that is the part of the case yet to be disposed of. The final settlement made by the assignee, and the discharge of that officer from his functions, constitute, within the meaning of this amendment, the final disposition of the bankruptcy.

Under the act as it originally stood, this provision was variously interpreted. Congress, however, interposes to fix a new period, and declares that the bankrupt may ask for his discharge before the case is so disposed of, or, in other words, before the assignee has completed his administration and received his discharge. If any liberality of construction was indulged before this amendment, there seems to be no place for it now. Congress evidently intended to fix a limit within which a discharge could be asked for, and they very reasonably repealed the arbitrary limitation of one year, and substituted one not open to the objection that the estate remained unsettled—that is, that the period for applying for discharge must not be later

than the final report and discharge of the assignee. Such, I think, is the only conclusion that can be reached, for it is the only one that gives any effect to the legislation of Congress.

This is substantially the view taken by the District Court of the United States for the Northern District of New York, and sustained on review by the circuit court for the same district, in *Re* Brightman and Lasee, 15 N. B. R. 213. The application for discharge comes too late, and is therefore rejected.

BOOK NOTICE.

TOWNSHEND ON SLANDER AND LIBEL, THIRD EDITION.—A Treatise on the Wrongs called Slander and Libel, and on the Remedy by Civil Action for these Wrongs, to which is added in this edition a chapter on Malicious Prosecution. By JOHN TOWNSHEND. New York: Baker, Voorhis & Co. 1877.

It would be a work of supererogation to say anything concerning the general character of a work so well known to the American profession as this. No better evidence of its excellence can be addnced than the fact that the conclusions of its author are constantly cited by the best courts in the country. The author's method of treatment of the subject is thoroughly scientific, "Among other things," says he in his preface, "I have endeavored to demonstate:

"I. The gist of an action for slander or libel is the pecuniary injury.

"II. The *malice* necessary to maintain an action for slander or libel is only the absence of a legal excuse for making the publication.

"III. The phrases *malice in fact* and *malice in law* do not mean different kinds of malice, but describe only different kinds of proof.

"IV. The existence of a distinction between language concerning a person and language concerning a thing, and in what the distinction consists.

"V. 'Slander of title,' so called, is within the class of language concerning a thing.

"VI. The right to give what is called 'a character to a servant,' does not arise out of any relation of master and servant, but out of the general right to communicate one's belief, in a *bona fide* desire to protect one's own or another's right.

"VII. The right of 'criticism' is within the class of language concerning a thing.

"VIII. Malicious prosecution is the publication of defamatory language in a court of justice."

The author also states that the present edition differs from the preceding in containing several hundred additional references to decisions in American, English, Irish, Scotch, Canadian and Australian reports, and also in the addition of a chapter on "Malicious Prosecution." The numbering of the sections corresponds with previous editions. The mechanical execution of book is excellent.

LOWELL'S DECISIONS.—Judgments delivered in the Courts of the United States for the District of Massachusetts. By JOHN LOWELL, LL. D., District Judge. Vol. II. Boston: Little, Brown & Co. 1877. pp. 631.

This volume embraces such of the judgments of Judge Lowell between February, 1871, and May, 1877,—a period of over six years,—as the learned judge considers to be of such general and permanent interest as to deserve to be reported. The ripe learning and the great ability of the District Judge of the United States for Massachusetts give an unquestionable value to his well-considered and carefully prepared judgments. He is his own reporter. As a Bankruptcy and Admiralty judge, he is not only distinguished, but eminent; and no competent lawyer, who carefully examines the present volume, will question that his reputation is fully deserved. The volume itself is intrinsically most valuable, and its value is heightened by the excellent style and manner of the reporting. The Reporter and the Judge seem, indeed, to have engaged in a generous rivalry, each to do his part the best, and the result is a book which may fairly be regarded as a *model* of Law Reports. This is high praise, but it is praise to which it is justly entitled.

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

INDIAN LANDS TAXABLE.—1. The lands belonging to the mixed and half-bloods of the Sac and Fox Indians, residing in Kansas, but who have tribal relations with the confederated tribes in the Indian Territory, are taxable and alienable, where the government has issued to the allottees under amended article 17, of the treaty of February 18th, 1867, patents in *fee simple* therefor. Opinion by HORTON, C. J. All the justices concurring. Reversed.—*County Commissioners v. Pennock.*

ORDER DISCHARGING AN ATTACHMENT NOT APPEALABLE TO THE DISTRICT COURT.—An order of a justice of the peace, discharging an attachment under section 53 of the justices' act, (Gen. Stat. 787, section 53), is not a "final judgment" within the meaning of section 120 of the justices' act, relating to appeals; (Gen. Stat. 800, section 120); and therefore no appeal will lie from such an order to the district court. Opinion by VALENTINE. J. All the justices concurring. Affirmed.—*Butcher v. Taylors.*

LAWS NOT REPEALED BY IMPLICATION.—Section 7 of the act of 1874, relating to roads and highways, (Laws 1874, page 168) does not repeal by implication or otherwise, any part of section 30 of the act of 1868 relating to counties and county officers; (Gen. Stat. 260) but both sections may and do have force and operation; and "any person feeling himself aggrieved by the award of damages made by the board of county commissioners [in establishing a road] may appeal from the decision of said board of county commissioners" under either section. Opinion by VALENTINE, J. All the justice concurring. Reversed.—*Wilson v. County Commissioners of Cowley County.*

PAROL EVIDENCE—Where the two members of a co-partnership enter into a written contract for the dissolution of their co-partnership, and for a sale, at some future and indefinite time, of all their partnership assets, and afterwards a sale is made of such assets,—one of the partners becoming the purchaser; *Held*, that the other partner may show, in an action between the two partners, by parol evidence, that said sale was not made in exact accordance with the terms of the written contract; and such evidence can not be excluded on the ground that it would contradict, or vary the terms of said written contract. Opinion by VALENTINE, J.; all the justices concurring. Reversed.—*Todd v. Allen.*

PRACTICE AS TO PLEADINGS IN APPEAL CASES.—1. Plaintiff sued defendant before a justice of the peace on a bond, and filed a full statement of his cause of action in a bill of particulars, attaching thereto a copy of the bond. Defendant filed no pleading. After judg-

ment defendant appealed to the district court, and there, at one term, by consent, an order was entered for defendant to answer in twenty days from the close of the term. At the next term, the time having elapsed and no answer having been filed, the case was tried. Defendant having offered evidence of payment which was admitted over the objection of the plaintiff. *Held*, error; that the order for answer was mandatory and not permissive; that the defendant was in default, and that evidence of payment was inadmissible under the pleadings. Opinion by BREWER, J.; all the justices concurring. Reversed.—*The G. & B. Sewing Machine Co. v. Redfield.*

PRACTICE—AUTHORITY OF AGENT.—1. The court below, after the jury was empanneled and after the plaintiff stated his case, granted leave to the defendant to verify his answer by affidavit, upon the condition that the plaintiff might, if he chose, continue the case till the next term of the court at defendant's cost: *Held*, no error as against the plaintiff. 2. A., who claimed to act as the agent of J., employed P. to assist as an attorney and counselor at law, in the defense of an action wherein H. was plaintiff and S. was defendant. A., however, had no express authority to so employ counsel, nor any authority from J. except a general authority to manage certain property belonging to J. J. was not a party to said suit, nor interested therein, except that the decision of some of the legal questions involved therein, might as a precedent affect some of the legal rights of J. to certain property of A. not involved in said controversy. P. assisted in the defense of said suit, but J. in no manner ever ratified his employment: *Held*, that J. is not liable to P. for his said services; that a general authority given to manage the property of J., can not be considered as an authority to employ counsel in the case concerning some other person's property. Opinion by VALENTINE, J. All the justices concurring. Affirmed.—*Perry v. Jones.*

HEARSAY EVIDENCE—PROOF OF CONTRACT.—1. Where M. had a contract with the St. Louis, Lawrence and Western Railway Company, to act as its agent at Wichita to influence the shipment of cattle over its railroad from Carbondale to Chicago and St. Louis, and was to receive as compensation for his services a certain stated sum for every car-load of cattle shipped by the way of Carbondale in cars over said road, and in an action against such railway company to recover his compensation under the contract, he proved the number of cars shipped from Wichita by the Atchison, Topeka and Santa Fe Railroad, billed to Chicago and St. Louis, via Carbondale and the said St. Louis, L. & W. R'y, by a book or record of the A. T. & Santa Fe R. R. Co. containing the letter-press copies of quarterly reports of the shipment of live stock from Wichita, made by an agent of the A. T. & Santa Fe R. R. Co. to the general freight agent of said last-named company, from dray tickets, which were all on file, and said book not being a book of original entries, nor an account-book; *Held*, that such evidence was clearly incompetent, as coming within the definition of hearsay evidence; and, *held*, that for the admission of such evidence against the party complaining, and over his objections, the judgment of the district court will be reversed. 2. A contract which is not required by statute to be in writing, may be partly expressed in writing and partly in an unwritten understanding between the parties; and if so, such understanding may be proved by parol. Opinion by HORTON, C. J.; all the justices concurring. Reversed.—*St. Louis, Lawrence and Western R'y Co. v. Maddox.*

EXEMPLARY DAMAGES.—1. Where the testimony discloses gross and wanton negligence on the part of the defendant, the jury may award exemplary damages, and an instruction to that effect is not error. Wiley v. Keokuk, 6 Kas. 94; Sawyer v. Sauer, 10 Kas. 466; L. & G. R. R. Co. v. Rice, 10 Kas. 426. 2. Where it appears that prior to January 1st, the defendant had been in the habit of carrying passengers on his freight trains, and on that day a regulation went into effect prohibiting the carrying of passengers on such trains east of Brookville, but making no change as to such trains west thereof, and where it does not appear that any public notice was given of such change, and does affirmatively appear that the ticket agent at Bosland, one of its stations west of Brookville, received no notice thereof, and did not in fact know of it until the middle of March following, and then only as he heard it from a passing conductor, and that on the 2d day of March he sold plaintiff a ticket to Salina, a station east of Brookville, and assured him that it was good to carry him there on a freight train then approaching the station, and that plaintiff entered such train and rode without objection or notice of the change of rule, until it had passed Brookville, when he was put off after dark by the conductor at a small station, about half way between Brookville and Salina; and where it appears from the testimony of the agent, that he had been in the habit, up to said second of March, of selling tickets to be used on freight trains east of Brookville, and from the testimony of the conductor that he had frequently put passengers off from his train, but had never had any trouble about it before: *Held*, that a verdict of $820, $800 of which the jury specifically awarded as exemplary or punitive damages, would not be set aside by this court. Opinion by BREWER, J. All the justices concurring. Affirmed.—*Kansas Pacific Railway Co. v. Kesseler.*

AUTHORITY OF AGENT.—1. H. owned certain county bonds and coupons issued by the county of Leavenworth, and payable at the Metropolitan National Bank of New York. These bonds had long been overdue and dishonored, and their negotiability destroyed. H. resided in Philadelphia, and sent said bonds in a letter to M., who resided in Leavenworth county, stating in said letter as follows: "I send you the following bonds and coupons of the county of Leavenworth, which you will please do the best you can *in settlement;* treat them the same as you would if they were your own. [Here follows a description of the bonds, and then the letter concludes:] We had the bonds and coupons that were due presented for payment at the Metropolitan Bank, New York. They said there was no money to meet them, and had not been for years. Hoping you may be able to *make a settlement*, I am yours truly, H." *Held*, That said letter did not give to M. any power to sell said bonds to a third person, or any power to authorize any other person to do so. 2. Afterwards M. delivered said bonds to S., an attorney at law and business agent, though not a dealer in bonds, for the purpose that S. should collect the amount thereof from the county in money or new bonds, or in both; but S, in violation of his duty, sold said bonds to J. H., a third person, for a valuable consideration. *Held*, That such a sale was void. 3. S. had said bonds in his possession about three weeks from the time he received them until he sold them. At first he informed J. H. and others that he had them for collection, but afterwards he offered them for sale to several persons. M. at one time, on the request of S., consented that S. might receive offers for said bonds for the purpose of sending such offers to H.; but M. never authorized S. to offer said bonds for sale, and neither M. nor H. ever knew until after the sale that S ever did offer the same for sale. S. reported two offers for the bonds to M., and M. reported one of such offers to H., and H. declined the offer. *Held*, That, taking all the facts of this case together, they did not authorize S. to make said sale,

and they do not estop H. from denying the authority of S. to make the sale. Opinion by VALENTINE, J.; all the justices concurring.—*Hannon v. Houston.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1877.

HON. SAMUEL E. PERKINS, Chief Justice.
" HORACE P. BIDDLE,
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
} Associate Justices.

CRIMINAL PLEADING—INDICTMENT.—The common law form of indictments has been abolished in Indiana, and the substance only of what was necessary to make a good indictment at common law need now be charged. The necessary averments need only be put in plain and concise language, and certain to a common intent. Opinion by NIBLACK, J.—*Meirs v. The State of Indiana.*

PRACTICE—DISMISSAL OF ACTION.—Under the statutes, 2 R. S., 1876, 184, which provides that, "an action may be dismissed without prejudice, first, by the plaintiff before the jury retire, or, when trial is by the court, at any time before the finding of the court is announced," it is error for the court to permit the plaintiff to dismiss his suit after the finding of the court is announced. Opinion by WORDEN, J.—*Walker v. Heller.*

CHATTEL MORTGAGE—RECORDING OF—PAROL EVIDENCE AS TO DATE.—Under sec. 11, 1 R. S., 1876, 505, which provides that every chattel mortgage shall be considered as recorded from the time it shall be left at the proper recorder's office for that purpose, and the recorder not being required by any law of the state to make any record of the time when mortgages are left with him for recording, parol evidence is admissible to show the leaving of such mortgage and the time when it was left. Opinion by HOWK, J.—*Holman v. Doran.*

PARTNERSHIP—LIABILITY OF FIRM FOR TORT OF ONE PARTNER.—In this case one branch of the business of a firm was the buying and shipping of hogs. Appellant contracted with one of the partners for the shipment of his hogs on certain conditions. The partner sold the hogs and absconded with proceeds. The other members of the firm were cognizant of the agreement between the said partner and the appellant, but had no participation in the fraud practised by the former. *Held*, that the transaction was fairly within the scope of the partnership business, and the firm must be bound for the fraud of one of their members, since they were the occasion of the confidence and credit reposed in him. Opinion by HOWK, J.—*Jackson v. Todd et al.*

MORTGAGE—INDEFINITE DESCRIPTION—POWERS OF COUNTY COMMISSIONERS.—1. Where the description of property in a mortgage is so indefinite as to render the mortgage void, a good complaint can not be founded upon it; but where the description is sufficient to convey the property, but not definite enough to enable a third person to specify the exact boundaries, if the complaint upon the mortgage alleges the true boundaries, it will be good. Proof of the allegations may be heard, and upon such proof a decree entered specifying the true boundaries and the officer authorized to sell and convey accordingly. 2. If a board of county commissioners have power to take an assignment of a mortgage, it can do so in public session without a record being made of it, and the assignment may be proved by parol. Opinion by PERKINS, C. J.—*Halstead et. al. v. The Board of County of Com'rs of Lake County.*

NOTES.

A NEW venture in legal journalism has come to us in the shape of a neat weekly of 16 pages, 8vo, called the *San Francisco Law Journal*. Assuming that the *Pacific Law Reporter* meets the local wants of the profession on "the slope," we do not precisely see the need of another law journal there, nor how it is to be sustained. In point of typographical execution and general make-up this new one is superior to its older brother, and perhaps so in the manner in which it is edited; but it exhibits some of the defects of the former publication. Nothing, for instance, can justify the publication of unimportant opinions of a court without a head-note or statement of facts. There is no money in legal journalism, and the quicker adventurers in this field find it out the better it will be for them or their creditors. Lawyers as a class are negligent about paying small bills; and unless a journal is really a necessity to them, it costs as much to collect the subscription as it does to furnish the publication. This fact no doubt accounts for the many inferior ventures which are forced upon the generosity of an unwilling profession. Some of our exchanges positively fall below the dignity of paste-and-scissors productions. They look as though they were edited with a bootjack in the hands of a printer's devil. While upon this subject we will say that if any ambitious young man, with a wild and haggard eye, and a fond and doting parent, with money to back him, will stalk into our office, we will tell him where he can purchase a law journal cheap—one that has a good reputation and a solid subscription list.

IN AN address before the Millers' National Association, which met at Buffalo last spring, Mr. George Bain, of St. Louis, president of the association, put the following queries with regard to patent rights: "*First.* Must *not* the inventor, in order to establish claim, prove (first) priority of invention; (second) that he has developed it to useful working condition; (third) that he has placed it within reach of the public on reasonable terms in proportion to actual benefits? *Second.* Can parties who have bought and paid for patented machines be held liable to other patentees who may subsequently legally establish superior claim to the invention, except for use of same *after* proper personal notice of such legal decision? *Third.* In establishing the benefits accruing to a manufacturer by the use of a patented invention—say the millers using purifiers—can anything more than actual benefit be assessed? or are *constructive* benefits to be assessed?" It would certainly seem that these questions ought all to be resolved in the affirmative, except the last clause of the first question. When a man has established an exclusive right to a certain invention that is his property, and he has a right to charge as much for it as he pleases, just as Mr. Bain has a right to charge $20 a barrel for the excellent flour he makes, if he chooses to do so; and the same inexorable laws of trade which would oblige Mr. Bain to offer his flour at a reasonable price will ultimately oblige the patentee to sell licenses to use his patent "on reasonable terms, in proportion to actual benefits."

THE *Albany Law Journal* says: "The newspapers are again discussing the appointment for the vacancy now existing upon the Federal Supreme Court bench, and suggesting numerous names for the consideration of the President. As the Senate has a voice in the matter, and as that body sometimes exercises its privilege in a way not in harmony with the wishes of the executive, it is perhaps well that the President has postponed his nomination, and that he does not act until the assembling of Congress, when he can consult with the leaders in the Senate, and avoid any wranglings similar to those which took place when the office of chief justice was vacant, and nominations were made by the President to fill it, which were unsatisfactory to a majority of the senators. As to the appointee, there is as much diversity of opinion as ever, though the circumstance that since 1860 all those chosen to the supreme bench have resided at the north or west, and the south is unrepresented, somewhat narrows the circle of candidates, and leaves only two or three prominent names as those among whom the President can properly make a selection. We have heretofore expressed our desire that Judge Dillon should receive the vacant place, but the territorial rule will exclude him. Among those named as likely to be appointed, Ex-Secretary Bristow seems to stand foremost, and we trust that he will be preferred both by the power that nominates and the one which confirms."